SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 531

UNITED STATES, Appellant,

vs.

BEN BLUE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

February, 1964 Grand Jury

UNITED STATES OF AMERICA, Plaintiff,

v.

BEN BLUE, Defendant.

INDICTMENT—Filed August 5, 1964

[26 U.S.C. §7201—Tax evasion 26 U.S.C. §7206(1)—Subscribing false corporate return]

The Grand Jury charges:

COUNT ONE

[26 U.S.C. §7201]

On or about April 15, 1959 in the Southern District of California, Central Division, defendant

Ben Blue,

who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife; wherein it was stated that their taxable income for said calendar year was the sum of $30,761.66, and that the amount of tax due and owing thereon

was the sum of $9,817.98, whereas, as he then and there well knew, their joint taxable income for the said calendar [fol. 3] year was the sum of $36,936.92, upon which said taxable income there was owing to the United States of America an income tax of $12,649.56.

[fol. 4] COUNT TWO

[26 U.S.C. §7201]

On or about April 15, 1960 in the Southern District of California, Central Division, defendant Ben Blue, who during the calendar year 1959 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1959, by filing and causing to be filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent joint income tax return on behalf of himself and his said wife; wherein it was stated that their taxable income for said calendar year was the sum of $28,372.98, and that the amount of tax due and owing thereon was the sum of $8,695.30, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $57,324.40, upon which said taxable income there was owing to the United States of America an income tax of $23,794.80.

[fol. 5] COUNT THREE

[26 U.S.C. §7201]

On or about June 30, 1961, in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1960 by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Los Angeles, at Los Angeles, California, a false and fraudulent income tax return, wherein he stated that his taxable income for the said calendar year was the sum of $12,107.86 and that

the amount of tax due and owing thereon was the sum of $3,442.98, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $22,927.88, upon which said taxable income he owed to the United States of America an income tax of $8,491.25.

[fol. 6] COUNT FOUR

[26 U.S.C. §7206(1)]

On or about March 10, 1959 in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1958 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1958 was $25,602.19 and that the tax thereon was $7,813.14 whereas, as he then and there well knew and believed, the correct taxable income was $29,589.45 and that the tax thereon was $9,886.51; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

[fol. 7] COUNT FIVE

[26 U.S.C. §7206(1)]

On or about March 12, 1960 in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1959 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every

material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1959 was $24,672.28 and that the tax thereon was $7,401.68 whereas, as he then and there well knew and believed the correct taxable income was $41,823.45 and that the tax thereon was $16,248.19; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

[fol. 8] COUNT SIX

[26 U.S.C. §7206(1)]

On or about June 8, 1961, in the Southern District of California, Central Division, defendant Ben Blue did wilfully and knowingly make and subscribe a United States Corporation Income Tax Return (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for the calendar year 1960 which was verified by a written declaration that it was made under the penalties of perjury, which said United States Corporation Income Tax Return he did not believe to be true and correct as to every material matter in that said United States Corporation Income Tax Return stated that the taxable income for Merry-Go-Round, Inc. for the calendar year 1960 was $3,736.85 and that the tax thereon was $1,121.06 whereas, as he then and there well knew and believed, the correct taxable income was $21,855.95 and that the tax thereon was $6,556.79; and said corporation tax return was filed with the District Director of Internal Revenue for Internal Revenue District of Los Angeles, at Los Angeles, California.

A True Bill.

G. I. Phelan, Foreman.

Francis C. Whelan, United States Attorney.

* * * * * * *

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

MINUTE ORDER RE ARRAIGNMENT AND PLEA—
Filed August 17, 1964

Defendant is arraigned and states his true name is as charged and pleads Not Guilty as to all 6 Counts of the Indictment.

The court orders case transferred to the calendar of Judge Hall and continued to September 15, 1964, 10:00 A.M., for setting, and time to file motion extended 20 days.

* * * * * * *

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

[Title omitted]

NOTICE OF MOTION TO DISMISS INDICTMENT—
Filed November 24, 1964

To: MANUEL L. REAL
United States Attorney
Attorney for Plaintiff
312 North Spring Street
Los Angeles 12, California

PLEASE TAKE NOTICE, that the undersigned will bring on a Motion to Dismiss for hearing before the Honorable Peirson M. Hall in Room One, United States Court

House, 312 North Spring Street, City of Los Angeles, on the 7th day of December, 1964 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Mortenson and Maxwell
By: Clyde R. Maxwell
Attorneys for Defendant

Dated: 23rd day of November, 1964

[fol. 73]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 CD

MOTION TO DISMISS INDICTMENT—Filed November 24, 1964

The defendant, Ben Blue, hereby moves the Court to dismiss the indictment herein on the grounds that the United States, by the levy of a jeopardy assessment, the filing of income tax liens and the seizure of the defendant's properties, has made it impossible for the defendant to have a fair trial, has deprived the defendant of the due process of law, has denied the defendant the right to employ counsel of his choice and has compelled the defendant to testify against himself all in violation of the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. In support of said Motion, defendant respectfully alleges:

1. That on August 6, 1964 defendant herein was indicted for the evasion of the income taxes of himself and his wife for the years 1958 and 1959 and of himself for the year 1960 and for knowingly making and subscribing false corporation income tax returns on behalf of Merry-Go-[fol. 74] Round, Inc., a California corporation, for the years 1958 to 1960, inclusive.

2. Defendant Ben Blue is a well known theatrical artist who has been entertaining the American public for over forty years. During the years 1958 to 1960 and at the

present time, defendant was, and now is, married to Axie Blue. During said period of time they did own and now do own all of the stock of two California corporations, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc.

3. That although defendant, Axie Blue, and Merry-Go-Round, Inc. had extended the applicable statute of limitations for assessment to June 30, 1964 at the request of the United States, on April 9, 1963 without notice to the defendant, the United States made so-called "jeopardy" assessments of the following income and excise taxes, penalties and interest, under the provisions of §6861(a) of the Internal Revenue Code of 1954:

		Deficiency	*Penalty*	*Interest to 4/9/63*
Ben & Axie Blue	Income tax 1958	$ 12,023.18	$ 6,011.59	$2,874.86
Ben & Axie Blue	Income tax 1959	28,015.27	14,007.64	5,017.80
Ben Blue	Income tax 1960	12,726.19	6,363.10	1,515.81
Axie Blue	Income tax 1960	12,569.66		1,497.17
Merry-Go-Round	Income tax 1958	13,861.73	6,930.87	3,383.78
Merry-Go-Round	Income tax 1959	41,610.73	20,805.37	7,660.93
Merry-Go-Round	Income tax 1960	28,460.58	14,230.29	3,532.23
Merry-Go-Round	Excise tax 1/1/58 to 12/31/60	17,115.43	8,557.72	3,504.70

4. That on or about April 9, 1963, the United States made income tax liens of public record pursuant to said assessments.

5. That pursuant to said assessments and liens on April 12, 1963 the United States levied upon and seized the amount of $5,387.38 which was the community property of the defendant and Axie Blue, his wife, and was on deposit in a savings account in the name of Axie Blue at the Beverly Hills Federal Savings and Loan Association, 9424 Wilshire Boulevard, Beverly Hills, California.

6. That on April 12, 1963 the United States levied upon and seized $10,434.68 from an account in the name of [fol. 75] Merry-Go-Round, Inc. on deposit with Security First National Bank, 1401 Wilshire Boulevard, Santa Monica, California.

7. That on April 12, 1963 the United States levied upon and seized the amount of $4,032.12 on deposit in an account in the name of Ben Blue with the City National Bank, Roxbury and Wilshire, Beverly Hills, California.

8. That on April 17, 1963 the United States levied upon

and seized $15,617.70 on deposit in the name of Merry-Go-Round, Inc. with Julius Stern, 1528 West Seventh Street, Los Angeles, California.

9. That on April 17, 1963 the United States levied upon and seized all right, title and interest that the defendant and his wife, Axie Blue, had in an account under the name of Pantomine Enterprises, Inc. at Ira Haupt and Company, 166 North Canon Drive, Beverly Hills, California which account contained the following securities and credits of the following approximate values:

Number of Shares	*Name of Security*	*Quotation*	*Market Value*
200	Beckman Instrument	73.25	$ 14,650
300	Great Northern R.R.	61.25	18,375
400	Hertz Corporation	32 ⅝	13,050
200	May Company	57.25	11,450
600	M.C.A. Inc.	46 ⅛	27,675
400	Pitney-Bowes, Inc.	40.5	16,200
303	Revlon, Inc.	38 ⅝	11,703
400	Sears Roebuck & Co.	134	53,600
Credit Balance (Accrued Dividends)			3,839.14
TOTAL			$170,542.14

That since said levy has been made said securities and credits have been held by said Ira Haupt and Company and its successor Francis I. DuPont and Company subject solely to the order of the United States.

10. That on April 18, 1963 the United States levied upon and seized all right, title and interest that the defendant and his wife had in an account under the name of Pantomine Enterprises, Inc. at Bache and Company, 445 North Roxbury Drive, Beverly Hills, California which account [fol. 76] contained the following securities and credits of the following approximate market values.

Number of Shares	*Name of Security*	*Quotation*	*Market Value*
202	Revlon, Inc.	38⅝	$7,802
Credit Balance (Accrued Dividends)			276.65
TOTAL			$8,078.65

11. That at the time said jeopardy assessment, tax liens and levies were made, the United States had made a determination to institute the within criminal proceedings against the defendant.

12. Under date of June 6, 1963 the United States issued statutory notices of deficiencies against the defendant, his wife and Merry-Go-Round, Inc. for the following periods and in the following amounts:

Taxpayer	*Year*	*Tax*	*Deficiency*	*Penalty*
Ben & Axie Blue	1958	Income	$ 9,172.51	$ 4,586.26
Ben & Axie Blue	1959	Income	20,492.94	10,246.47
Ben Blue	1960	Income	5,339.75	2,669.88
Axie Blue	1960	Income	5,246.81	
Merry-Go-Round	1958	Income	12,317.76	6,158.88
Merry-Go-Round	1959	Income	39,287.18	19,643.59
Merry-Go-Round	1960	Income	24,906.60	12,453.30

13. Said notices stated that the assessments of April 9, 1963 were erroneous and would be abated to the extent that they exceeded the deficiencies set forth herein above. Each of said statutory notices contained the following statement:

> "If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C."

[fol. 77] 14. Under date of June 19, 1963 the United States notified Merry-Go-Round, Inc. that the jeopardy assessment made against it on April 9, 1963 for excise tax for the taxable period January 1, 1958 to December 31, 1960 had been excessive in that it overassessed excise tax in the amount of $4,128.83, penalties in the amount of $2,-064.40, and interest in the amount of $744.20.

15. That of the funds seized as above set out, the District Director of Internal Revenue at Los Angeles, California applied $26,052.38 to the alleged deficiencies, penalties and interest which it was asserted that Merry-Go-Round, Inc. owed for excise taxes for the period January 1, 1958 to December 31, 1960.

16. That Merry-Go-Round, Inc. on July 2, 1963 filed a claim for refund for said amount of $26,052.38; that no action was taken on said claim by the District Director of

Internal Revenue and on April 28, 1964, Merry-Go-Round, Inc. brought suit in the United States District Court for the Southern District of California, Central Division for recovery of said amounts so seized and so applied to its alleged Federal excise tax liability for said period, said suit being No. 64-561-HW; that said suit is still pending and no action has been taken thereon by the United States.

17. That pursuant to said statutory notices, petitions to the Tax Court of the United States were filed contesting the taxes and penalties alleged to be due by the United States on behalf of Ben Blue, Axie Blue and Merry-Go-Round, Inc. That as required by the rules of the Tax Court of the United States, said petitions were verified by petitioners and stated the facts upon which petitioners relied in contesting said deficiencies in tax and penalties. Said petitions were filed on July 29, 1963 and copies thereof served on the United States on July 30, 1963 and are docketed as Docket Nos. 3612-63 to 3615-63 in the records of the Tax Court of the United States. Said petitions are tentatively scheduled for trial on March 8, 1965 at Los Angeles, California.

[fol. 78] 18. That by reason of the aforesaid assessments and the consequent filing of tax liens and seizure of defendant's assets and those of his wholly owned corporations Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. the defendant is unable to retain counsel of his choice and is unable to retain the necessary accountants and investigators to properly prepare his case for trial as he would have been able to do had the assessments liens and levies not been made against him, his wife and his wholly owned corporations.

19. That the defendant by and through attorneys specially retained for said purposes did advise the United States both prior to and subsequent to the return of the indictment herein that he would be unable to properly prepare for the trial of a criminal case and to retain the attorneys of his choice unless said assessments and tax liens were abated and revoked and his property released by the United States; and defendant made demand upon

the United States for it so to do but all said demands were denied and refused.

20. That there is a general administrative policy of the United States that in cases where criminal tax charges are to be instituted against an individual, no assessment or statutory notice will be issued by the United States until the criminal proceedings have been concluded. That failure to accord defendant the benefits of this policy has denied him due process of law.

21. That by virtue of the assertion of taxes, penalties and interest against the defendant, the filing of income tax liens and the seizure of his assets, the defendant has been compelled to execute statements of fact pertaining to his income tax liabilities for the years 1958 to 1960, inclusive, in pleadings required to be presented to the Tax Court of the United States and to the Internal Revenue Service, thereby compelling this defendant to testify against himself in violation of the Fourth and Fifth [fol. 79] Amendments to the Constitution of the United States.

22. That many of the above-stated facts cannot be supported fully by affidavit but must be established at a hearing wherein defendant can compel testimony of witnesses now in the employ of the United States Government and can adduce documents now in the possession of the United States Government.

WHEREFORE, the defendant prays that the Court grant the defendant a hearing on this Motion wherein defendant can compel the testimony of witnesses and can adduce documents;

That the indictment herein be dismissed on the grounds and for the reasons that:

1. That he would be able to have a fair trial

2. That he has been denied the right to counsel of his own choice in violation to the Sixth Amendment to the Constitution of the United States, and

3. That he has been compelled to testify against himself in related proceedings in violation of his rights under

the Fourth and Fifth Amendments to the Constitution of the United States;

and for such other relief as the Court may deem just.

Respectfully submitted,

Mortenson and Maxwell
By: Ernest R. Mortenson

Dated: 23rd day of November, 1964

[fol. 80] No. 33950 CD

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT

ERNEST R. MORTENSON being duly sworn on oath, deposes and says:

1. That on or about May 25, 1961 he was retained by Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. to represent them before the Treasury Department in connection with Federal taxes of all kinds for any and all years.

2. That deponent is informed and believes it to be true that defendant Ben Blue is a well known theatrical artist who has been entertaining the American public for over forty years; that during the years 1958 to 1960 and at the present time, defendant was, and now is, married to Axie Blue; that during said period of time they did own and now do own all of the stock of two California corporations, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc.

3. That after said date numerous conferences were held [fol. 81] with Special Agent Charles C. Freeman and Internal Revenue Agent John D. Katz concerning the income tax liabilities of Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. for the years 1958 to 1960, inclusive.

4. That on or about January 29, 1962 he received a request dated January 25, 1962 from Revenue Agent John D. Katz to execute extension of the period of limitation for assessment of income taxes against Pantomine Enterprises, Inc. for the taxable year ended November 30, 1959,

Merry-Go-Round, Inc. for the taxable year ended December 31, 1958 and Ben and Axie Blue for the taxable year ended December 31, 1958. These consents were executed and the statute of limitations for said taxable years for the stated corporations and individuals were extended to June 30, 1963.

5. That at his request the Internal Revenue Service furnished under dates of April 23, 1962 and October 30, 1962, information as to income tax payments made by Ben and Axie Blue for the years 1932 to 1960 in the total amount of $126,672.60.

6. That on November 2, 1962 he was advised in writing by Robert K. Lund, Chief, Intelligence Division, Office of Director of Internal Revenue, Los Angeles, California, that consideration was being given to possible criminal proceedings against defendant Ben Blue for attempted evasion of his income taxes and those of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive, and that he was offered at that time a conference with Daniel J. Breslin, Group Supervisor, of the Intelligence Division on November 13, 1962 at Los Angeles, California. Such a conference was held and he was advised that the District Director would recommend prosecution of Ben Blue for the years 1958, 1959 and 1960 for income tax evasion and for evasion of the taxes of Merry-Go-Round, Inc. for the same years.

7. That on February 20, 1963 Robert A. Riddell, District Director of Internal Reveneue, Los Angeles District, [fol. 82] requested additional extension of the period of limitation for Ben Blue and Axie Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. from April 15 and June 30, 1963 to and including June 30, 1964. These consents were executed and forwarded to John D. Katz, Internal Revenue Agent, on March 7, 1963 and were received by the Audit Division on March 8, 1963.

8. That at the written invitation of Raphael Pierce, Acting Assistant Regional Commissioner, Intelligence, San Francisco Region of the Internal Revenue Service, a conference was held with Reviewer-Conferee Thomas S. McCart on March 8, 1963 at Room 1276, Flood Building, 870 Market Street, San Francisco, California. At this con-

ference he was again advised that the Internal Revenue Service had recommended prosecution of defendant Ben Blue for evasion of his taxes and those of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive.

9. That on April 9, 1963, despite the fact that one month previous thereto, the respective taxpayers Ben Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. had executed consents to extend the statute of limitations to June 30, 1964 with respect to their tax liabilities for the years 1958 and 1959, the Director of Internal Revenue at the specific request of the Intelligence Division of the Office of the District Director at Los Angeles, did make assessments against the defendant, Ben Blue, Axie Blue, his wife, and Merry-Go-Round, Inc. and pursuant to these assessments, on said date or shortly thereafter, the Director of Internal Revenue filed liens against all of the assets and properties of the defendant Ben Blue, Axie Blue, his wife, and Merry-Go-Round, Inc. and levied upon and seized the bank accounts and other assets of Ben and Axie Blue and Merry-Go-Round, Inc. as well as the brokerage accounts of Pantomine Enterprises, Inc. (as set out in the Motion to Dismiss). The assessments were in the following amount for the following individuals or corporations:
[fol. 83]

Taxpayer	*Year*	*Tax*	*Amount of Tax*	*Penalty*	*Interest*
Ben & Axie Blue	1958	Inc.	12,023.18	6,011.59	2,874.86
Ben & Axie Blue	1959	Inc.	28,015.27	14,007.64	5,017.80
Ben Blue	1960	Inc.	12,726.19	6,363.10	1,515.81
Axie Blue	1960	Inc.	12,569.66		1,497.17
Merry-Go-Round, Inc.	1958	Inc.	13,861.73	6,930.87	3,383.78
Merry-Go-Round, Inc.	1959	Inc.	41,610.73	20,805.37	7,660.93
Merry-Go-Round, Inc.	1960	Inc.	28,460.58	14,230.29	3,532.23
Merry-Go-Round, Inc.	1/1/58 to 12/31/60	Excise	17,115.43	8,557.72	3,504.70

10. That deponent is informed and believes it to be true that levies and seizures of the assets of defendant Ben Blue and his wife, Axie Blue, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc. were made as described in paragraphs 5 to 10 of the within Motion to Dismiss to which this affidavit is attached.

11. That without demand or request on the part of the defendant or Merry-Go-Round, Inc., on or about June 12,

1963 the District Director of Internal Revenue recognized that said assessments were excessive in amount and issued new jeopardy assessments in a smaller amount and abated in part, the first assessments. The corrected assessments were in the following amounts:

Taxpayer	*Year*	*Tax*	*Amount of Tax*	*Penalty*
Ben & Axie Blue	1958	Inc.	$ 9,172.51	$ 4,586.26
Ben & Axie Blue	1959	Inc.	20,492.94	10,246.47
Ben Blue	1960	Inc.	5,339.75	2,669.88
Axie Blue	1960	Inc.	5,246.81	
Merry-Go-Round, Inc.	1958	Inc.	12,317.76	6,158.88
Merry-Go-Round, Inc.	1959	Inc.	39,287.18	19,643.59
Merry-Go-Round, Inc.	1960	Inc.	24,906.60	12,453.30

12. That on or about June 7, 1963, defendant was advised by the United States that the above assessments had been made and given ninety days within which to file petitions with the Tax Court if he desired to controvert the amounts claimed by the United States to be due and owing in any way.

13. That on or about July 29, 1963 the defendant, Axie Blue and Merry-Go-Round, Inc. filed petitions to the Tax Court in accordance with said instructions. That said [fol. 84] petitions as required by Tax Court Rules of Practice and Procedure contained clear concise statements of facts upon which petitioners intended to rely.

13. That on or about July 2, 1963, Merry-Go-Round, Inc. filed claim for refund of monies seized by the United States and applied to the excise tax assessment, as above set out, which claim contained a statement of facts upon which Merry-Go-Round, Inc. relied. That no action was taken upon said claim for a period of six months and more, whereupon and on or about April 28, 1964 Merry-Go-Round, Inc. filed suit for refund of said amounts, stating facts in the complaint upon which it relied.

14. That at the recommendation of the Internal Revenue Service and the United States, an indictment was returned against defendant on August 6, 1964, wherein he was charged with the evasion of the individual income taxes of himself and his wife for 1958 and 1959; of himself for 1960; and for making and subscribing false returns for Merry-Go-Round, Inc. for 1958 to 1960, inclusive, as follows:

Count	*Taxpayer*	*Year*	*Additional Tax Due*
1	Ben and Axie Blue	1958	$ 2,831.58
2	Ben and Axie Blue	1959	15,099.50
3	Ben Blue	1960	5,048.27
4	Merry-Go-Round, Inc.	1958	2,073.37
5	Merry-Go-Round, Inc.	1959	8,846.51
6	Merry-Go-Round, Inc.	1960	5,435.73

15. That deponent is informed and believes it to be true that all of defendant's assets have been seized by the United States and since the indictment herein he has not received any funds with which he could employ the attorney of his choice. That the United States has filed income tax liens against the defendant herein, Axie Blue, his wife, and Merry-Go-Round, Inc. in the amounts of the original assessments set out in paragraph 9 herein and deponent is informed and believes it to be true that said liens have not been released and are still valid and subsisting [fol. 85] in their original amounts. That deponent is informed and believes that the defendant did not, at the time of said assessment, or at any time since, have sufficient funds or assets with which to pay his current tax liabilities together with said assessments; and that he was then and now is without sufficient funds to post bond to relieve himself of the onus of said assessment.

16. That defendant has requested the United States to abate said assessments, vacate said liens and to return the assets seized to the defendant or Merry-Go-Round, Inc. but it has refused to do so, even though advised that defendant otherwise will be unable to retain counsel for his defense in this action. That the assets seized and held by the United States are sufficient to enable defendant to employ counsel of his choice and to employ accounting assistance and otherwise prepare for trial of this matter.

17. That deponent is informed and believes that there is a general administrative policy of the United States that in cases where criminal tax charges are to be instituted against an individual, no assessment or statutory notice will be issued by the United States until the criminal proceedings have been concluded.

18. That your deponent and his associate, Clyde R. Maxwell, have thus far appeared on behalf of the defend-

ant since indictment without retainer or fee and on the understanding that they may withdraw at any time.

19. That in addition to the services of counsel of his choice, it is the opinion of deponent that defendant requires the services of an expert accountant to properly prepare his defense in this case and for the assistance of counsel at trial as well as transcripts and other expenses of trial.

20. That deponent believes it to be necessary that a full opportunity be given the defendant to establish the above facts to the satisfaction of the Court and that this motion [fol. 86] be set for hearing on a day certain at which time the Court can hear testimony and take evidence.

21. That this affidavit is made in support of Motion to Dismiss the indictment in the above-entitled matter.

/s/ Ernest R. Mortenson
Ernest R. Mortenson
Attorney for Ben Blue

* * * * * * *

Duly sworn to by Ernest R. Mortenson. [jurat omitted in printing].

* * * * * * *

[fol. 125] [File endorsement omitted]

In the United States District Court
for the Southern District of California
Central Division

[Title omitted]

No. 33950 (PH) CD

Oppostion to Motion to Dismiss Indictment—
Filed December 7, 1964

The Government opposes the motion of defendant, Ben Blue, to dismiss the Indictment herein for the following reasons:

1. The making of a jeopardy assessment and subsequent liens and levies have not deprived defendant, Ben Blue, of any rights protected by the United States Constitution;

2. The court cannot determine, in advance of trial, whether or not defendant, Ben Blue, will have effective assistance of counsel at the trial.

This Opposition is based on the attached Memorandum [fol. 126] of Points and Authorities and the files and records of the case.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant U. S. Attorney
Chief, Criminal Section
J. BRIN SCHULMAN
Assistant U. S. Attorney
Assistant Chief, Criminal Section
/s/ J. BRIN SCHULMAN
Attorneys for Plaintiff,
United States of America

[fol. 127]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

GROUNDS OF DEFENDANT'S MOTION

Defendant, Ben Blue, has filed a motion to dismiss the Indictment herein on the following stated grounds:

> "... that the United States, by the levy of a jeopardy assessment, the filing of income tax liens and the seizure of the defendant's properties,
>
> has made it impossible for the defendant to have a fair trial,
>
> has deprived the defendant of the due process of law,
>
> has denied the defendant the right to employ counsel of his choice,
>
> and has compelled the defendant to testify against himself,
>
> all in violation of the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States."

II.

UNQUALIFIED CONCESSIONS BY THE GOVERNMENT

For the purpose of response to this motion only, the Government concedes the substantial accuracy of the following numbered paragraphs contained in defendant's moving papers:

1. Motion To Dismiss Indictment:

   1-6, inclusive,
   8

   12-14, inclusive, and
   17.

[fol. 128] 2. Affidavit in Support of Motion To Dismiss:

   1-5, inclusive,

   7 (including only page 3, lines 16-24, ending with words ". . . Merry-Go-Round, Inc. . . ", excluding balance of lines 24-30, and including lines 31-32, and page 4, lines 1-7),

   10-12, inclusive,

   13—on page 4, is excluded herefrom,

   13 (herein referred to as 13(a))—on page 5, is included herein,

   14.

III.

QUALIFIED CONCESSIONS BY THE GOVERNMENT

The Government concedes, as herein qualified, for the purpose of response to this motion only, the otherwise substantial accuracy of the following numbered paragraphs contained in defendant's moving papers:

1. Paragraph 7 of Motion:

   That the bank account referred to therein was in the name of Pantomine Enterprises, Inc.

2. Paragraphs 9 and 10 of Motion:

That the total market value of the stocks listed therein is as of the week of November 16, 1964.

3. Paragraph 15 of Motion:

That of the funds so seized, only $22,240.42 was applied to Merry-Go-Round, Inc., owed excise taxes.

[fol. 129] 4. Paragraph 16 of Motion:

That, contrary to line 20 thereof, on December 1, 1964, the Government filed its answer to this civil suit, Civil No. 64-561-HW, in the District Court. The said filing of an answer followed four stipulations between plaintiff, Ben Blue, therein, and the Government, extending the time within which the Government answer or otherwise plead. These stipulations were filed on or about the following dates—June 25, July 14, September 15 (amended on September 30), and November 24, 1964; the Government's answer was timely.

5. Paragraph 6 of Affidavit:

The Government sets out as an attachment hereto, a copy of the letter referred to herein. It is conceded that such a conference was held with Mr. Breslin, and that Mr. Breslin advised Mr. Mortenson, defendant's attorney, in substance that the *Special Agent*, with Mr. Breslin's concurrence, *would recommend* prosecution, as stated in this paragraph.

6. Paragraph 9 of Affidavit:

Lines 16 to 24 are conceded, and it is further conceded that levies served were *only* on those properties in which the Internal Revenue Service believed Ben Blue had an interest. It is not conceded that such levies covered *all* of the bank accounts or assets of Ben Blue, Axie Blue or of his corporations, or *any* bank account at all in the name of Ben Blue. The substantial accuracy of the balance of the paragraph is otherwise conceded.

* * * * * * *

[fol. 153] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

No. 33950 CD

REPLY TO OPPOSITION TO MOTION TO DISMISS INDICTMENT—
Filed December 29, 1964

For reply to opposition of the United States to dismiss indictment, the defendant Ben Blue states:

I.

Defendant accepts the unqualified concessions of fact contained in paragraph II of the Memorandum of Points and Authorities submitted by the United States attached to the Opposition to Motion to Dismiss Indictment.

II.

The defendant accepts the concessions of fact made by the United States in Paragraph III of the Memorandum of Points and Authorities attached to the Opposition to Motion to Dismiss Indictment. As to the qualifications of said concessions expressed in arabic numbered paragraphs in said Paragraph III, the defendant accepts the qualifications contained in Paragraphs 1, 2, 4 and 5 and makes no statement as to the qualifications proposed in Para-
[fol. 154] graphs 3 and 6.

WHEREFORE, defendant prays that the indictment herein be dismissed upon the grounds set out in his Motion to Dismiss.

* * * * * * *

[fol. 162]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

[Title omitted]

MINUTE ORDER DISMISSING INDICTMENT—February 8, 1965

Hearing on motion of defendant to dismiss; Earl Gardner, Ralph Leslie, Robert K. Lund, John D. Katz, Thos. R. Sheridan and Earnest Mortensen are sworn as witnesses for defendant.

Defendant's exhibits A, B, C, D, E, F, and G, and plaintiff's exhibit 1 admitted in evidence; both sides rest.

Court hears statement of counsel, and indictment dismissed; defendant discharged; bond exonerated.

* * * * * * *

[fol. 164] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 33950 (PH) CD

[Title omitted]

NOTICE OF APPEAL—Filed March 9, 1965

The appellant is the United States of America.

Appellant's attorney is Manuel L. Real, by John K. Van de Kamp, Chief, Criminal Division and J. Brin Schulman, Assistant Chief, Criminal Division.

The address of appellant and of appellant's attorney is 600 Federal Building, Los Angeles, California 90012.

The offenses charges in the six counts of the Indictment against defendant-appellee Ben Blue, are in substance as follows:

Counts One, Two and Three:

Wilful attempts to evade and defeat personal income tax due and owing to the United States, by filing false and fraudulent income tax returns for each of the respective years 1958, 1959 and 1960, in violation of Title 26, United States Code, Section 7201;

Counts Four, Five and Six:

Wilful making and subscribing false corporate income [fol. 165] tax returns (Form 1120) on behalf of Merry-Go-Round, Inc., a California corporation, for each of the respective years 1958, 1959 and 1960, in violation of Title 26, United States Code, Section 7206(1).

The order appealed from is the order of the Honorable Peirson M. Hall, made and entered February 8, 1965, granting defendant Ben Blue's motion to dismiss the indictment, and dismissing the said indictment on the stated ground that the defendant's right against compulsory self-incrimination had been violated as a result of the making of a jeopardy assessment against said Ben Blue by the Internal Revenue Service, at a time when said Service had a criminal investigation then pending relating to said Ben Blue and which said jeopardy assessment required defendant Ben Blue to thereafter file a verified Petition in the Tax Court of the United States, all prior to the indictment in the case.

The defendant-appellee is not in custody.

Appellant United States of America hereby appeals from the said Order of February 8, 1965, dismissing the Indictment herein.

Dated: March 8, 1965.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
/s/ J. BRIN SCHULMAN
Assistant United States Attorney
Assistant Chief, Criminal Division

* * * * * * *

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Honorable Charles H. Carr, Judge Presiding

No. 33950—Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

BEN BLUE, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * * * *

[fol. 175] Los Angeles, California, Monday, August 17, 1964. 9:30 a.m.

(Other court matters.)

The Clerk: Item 34 on the calendar, Case No. 33950—Criminal, United States of America v. Ben Blue.

Mr. Mortenson: Ernest R. Mortenson and Clyde R. Maxwell appearing for Ben Blue.

May I make a statement, your Honor?

The Court: Yes, I suppose you can, counsel. It is a free country.

Mr. Mortenson: We are appearing specially today for purposes of plea. The reason for that is that in April 1963 the Government seized all of Ben Blue's assets in excess of $150,000.00, and he does not presently have money to pay counsel.

So we would like to appear specially this morning. We are going to request that the funds be released for purposes of employing counsel.

The Court: Well, who are you going to apply to to get the funds released? Not to me.

Mr. Mortenson: Well, that is a good question.

The Court: I have no power.

Mr. Mortenson: No.

The Court: If I did have I would grant it immediately. [fol. 176] Mr. Mortenson: Well, we are going to make a request of the Internal Revenue Service probably through the United States Attorney. If that is refused, then we will file a motion probably to dismiss the indictment.

The Court: Well, it would be a good time to test the constitutionality of making a man destitute when he needs a defense.

Mr. Mortenson: I think so, your Honor.

The Court: They are always preaching and talking about—when I say "they" I am talking about from the top to the bottom—about constitutional rights. If you take all of a man's money, why, the thing is I guess you can't live by bread alone, but you can't live without money alone either, especially in defending a case, an income tax case. It takes some work, considerable work, usually accounting fees, legal fees—yes, counsel.

• • • • • • •

[fol. 177] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Honorable Peirson M. Hall, Judge Presiding

No. 33950 CD

UNITED STATE OF AMERICA, Plaintiff

v.

BEN BLUE, Defendant

REPORTER'S TRANSCRIPT OF PROCEEDINGS

• • • • • • •

[fol. 178] APPEARANCES:

For the Plantiff: MANUEL L. REAL, United States Attorney, Los Angeles, California 90012; by J. BRIN SCHULMAN, Assistant United States Attorney.

For the Defendant: MORTENSON and MAXWELL, 961 East Green Street, Pasadena, California; by ERNEST R. MORTENSON, Esq., and CLYDE R. MAXWELL, JR., Esq.

* * * * * * *

[fol. 179] Los Angeles, California; Monday, February 8, 1965; 10:00 a.m.

(Other court matters.)

The Court: Very well. I guess that brings us down to United States v. Ben Blue.

The Clerk: Yes, your Honor. Case No. 33950, United States v. Ben Blue.

The Court: Proceed, counsel.

Mr. Mortenson: Yes, your Honor.

The Court: Mr. Mortenson, will you state what you expect to establish by evidence this morning and what legal points they go to. I have read your memorandum; in fact, I came down yesterday and spent all day reading these memoranda and these cases filed in this matter, and also a number of the cases cited. I have read both memoranda.

I would like to know specifically to what point you wish to address your evidence.

Mr. Mortenson: If it is agreeable with the court, my associate Mr. Maxwell will examine the witnesses and I will outline the case and state what we intend to show as far as the witnesses are concerned, if that procedure is agreeable to the court.

The Court: Yes, that is. However, I do not want too long a statement.

Mr. Mortenson: I will try to keep it as brief as [fol. 180] possible.

The Court: Very well.

STATEMENT BY COUNSEL IN BEHALF OF THE DEFENDANT

Mr. Mortenson: Before I mention the witnesses and the facts I am sure, having read the memorandum, that your Honor is aware of the basic issue and that is because a

jeopardy assessment was made and there was a subsequent Indictment that Ben Blue was compelled to testify against himself, he had to sign petitions that went to the Tax Court and, furthermore, when the assessments were made liens attached to not only all of his assets at that time, but after-acquired assets would be followed by the liens and any money which he paid to attorneys, for example, or accountants, would be saddled with a lien and at any subsequent time the Government could levy on these monies.

The Court: Let me see if I understand it correctly—there probably will be no contest of this fact—that the lien was filed about a year before the Indictment was returned?

Mr. Mortenson: Yes, your Honor.

The Court: That an investigative report concerned alleged criminality was under way when the lien was filed?

Mr. Mortenson: That is right, your Honor.

The Court: That the lien was filed and that Ben Blue, in order to protect his rights, had to either default or [fol. 181] file a petition before the Tax Court?

Mr. Mortenson: That is right, your Honor.

The Court: And that there is involved in the assessed taxes and in the petition in the Tax Court the taxes for the same years involved in this Indictment?

Mr. Mortenson: That is right, your Honor.

The Court: And your position is that if he proceeds in this Indictment he will have been compelled to be a witness against himself by virtue of having had to file a petition in the Tax Court or default to the Government's claim?

Mr. Mortenson: Precisely, your Honor. And we say that brings him squarely within Boyd v. United States where the Supreme Court held—

The Court: Well, I read the case.

Mr. Mortenson: May I mention that in the Boyd case it was not only held that the procedure was unconstitutional, but that in fact the statute itself was unconstitutional.

Now that is our position here.

The Court: I do not think in this proceeding that I can reach the constitutionality of the lien proceedings or the proceedings before the Tax Court, or that procedure or that statute.

Mr. Mortenson: Well, now, in the Heath case the Ninth Circuit held that the District Court had a right to and [fol. 182] should have dismissed the Indictment because the defendant could not have a fair trial.

Now that is our position here, that Ben Blue cannot have a fair trial and that the Indictment should be dismissed at this juncture.

Now that can be done on the ground that the procedure involved violates due process and violates his right to counsel of his choice, and also that he cannot have a fair trial because he has been compelled to file these documents in the Tax Court and to bring testimony against himself.

As I read the Heath case, this court can dismiss the Indictment; in fact, I believe we can establish facts stronger here than were existent in that case. In the Heath case the Government agents had been given some documents and when the case was about to go to trial a demand was made for those and the Government admitted that the documents were lost.

Well, now, the Government counsel in his brief says that the decision was based on the inability of the Government to produce the documents, but that is not what the court says in that case. The court says that it has the inherent right to dismiss an Indictment if it appears that the defendant cannot have a fair trial, it says it is like a judgment of acquittal, and that is why I say the case comes under the Heath case and whether the decision is that the statute [fol. 183] is unconstitutional is rather immaterial, it is a question of whether the defendant can have a fair trial within the meaning of the Heath case.

Now to come back to what we had intended to establish through the witnesses, the Government seems to claim that we have not made a showing that Ben Blue could pay counsel and could retain counsel.

That brings up the question of just what levies were made, whether Ben Blue was allowed any money to pay for counsel, to pay for accountants, or to pay other costs of trial.

Another thing involved is this, we hope to establish that it is the policy of the Government not to make jeopardy

assessments if criminal prosecution is contemplated, and we also would like to show that there is a correlation between the Tax Court cases and the criminal prosecution. In other words, that the Tax Court counsel correlates its work with the United States Attorney and, in fact, the collection officer coordinates his work with that of the United States Attorney.

* * * * * * *

[fol. 184] COLLOQUY

Mr. Schulman: Your Honor, before Mr. Gardner is called, I would like to state, if I may, that whatever that procedure may be the Government submits that it is immaterial to the determination of the issues of this proceeding, for two reasons: (1) there is nothing before the court to show that any statement of facts filed with the petitioner contain any incriminatory material, (2) even if it did contain grossly incriminatory material it hasn't been offered, that it is an admissibility of evidence question which should be determined at the time of trial. We may never offer it, even if there is anything to offer.

The Court: I take it that the plaintiff as part of the showing here is going to show that there were assessments levied and there was a petition filed and a copy of it? Do you have certified copies of the petition?

Mr. Maxwell: As a matter of fact, it has been stipulated to and conceded by the United States Attorney in his response to the defendant's motion.

Mr. Schulman: It has been conceded that a petition was filed and the statement of facts were attached to the petition but not that those statements of fact contained incriminatory material.

[fol. 185] The Court: Well, counsel, I am sort of at a loss to know what the law is about incriminatory material. The Supreme Court has made it very, very plain in all of its recent decisions, and especially when you read the minority opinions as to what the majority decided, that it lies solely in the discretion of a defendant as to whether or not what he says will incriminate him.

Mr. Schulman: There are several points in that, your

Honor, if I may state. The first point is, assuming that whatever—let us assume that in that statement of facts Mr. Blue said "I am guilty of all of the charges that the Government has brought against me for the following reasons," and outlines everything—now that is not a statement of fact, but assume it was, this procedure, which is a motion to dismiss the Indictment for a specific reason, does not bring that question to issue. This is not a motion to suppress evidence, it is a motion to dismiss an Indictment because of unfairness or some other ground.

The Court: You cannot suppress evidence that has already been obtained.

Mr. Schulman: Suppress it from use in the trial. That is what a motion to suppress evidence is.

Now if at the time of the trial the Government were to offer this statement of facts and say "Here is some additional evidence against Mr. Ben Blue," then the defendant [fol. 186] can properly say "Yes, that is not admissible, that was illegally obtained evidence." Maybe it was, maybe it wasn't. But that is the time to describe it or to decide it.

Right now we are talking about an issue that is not before the court, it hasn't been raised by a motion to suppress, and our concession—this goes back to the other point—the decision on what is or is not self-incrimination raises a whole new question which I don't think your Honor should rule on, and I dont know how your Honor can decide it without a motion to suppress evidence. If there is a motion to suppress, fine, then we can look at the statement of facts, see what it is, see if there was a waiver or whether it was voluntary, whether the question of the Fifth Amendment was ever raised when he filed the statement of facts, whether he could have done something else instead of filing, and then finally after having filed is there even anything incriminatory. But that is another question for another proceeding. I do not think it applies here.

Mr. Maxwell: If the court please, in the first instance Mr. Schulman is quite correct, what he is trying to do is make a motion to suppress out of our motion to dismiss. Our motion to dismiss is very simple in this particular

area and it is based on a very simple ground, that the Government by asserting this jeopardy assessment procedure knowingly forced the defendant to make petitions to [fol. 187] the Tax Court and make statements of fact relating to the very same years that are involved in the criminal case, all the time knowing that it intended to indict him.

The Court: Let us get your evidence in. Get your witnesses under way here.

Mr. Maxwell: Yes, your Honor.

Mr. Gardner, please.

Earl Gardner, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full.

The Witness: Earl Gardner.

The Clerk: Your address, please?

The Witness: 834 Abbott Avenue, San Gabriel.

Direct examination.

By Mr. Maxwell:

Q. What is your occupation, Mr. Gardner?

A. I am an attorney with the Regional Counsel, San Francisco Region.

Q. Of the Internal Revenue Service?

A. Of the Internal Revenue Service.

Q. Will you give the court a brief idea of the duties of your position.

[fol. 188] A. I represent the Internal Revenue Service in matters before the Tax Court primarily.

Q. You have assigned to you certain cases involving Ben Blue, Axie Blue and Merry-Go-Round, Inc. on income taxes for the years 1958 to 1960?

Mr. Schulman: Your Honor, I will object to that as being immaterial and irrelevant to any issue before this court.

The Court: Overruled.

The Witness: Did you say 1958 to 1960?

By Mr. Maxwell:

Q. Yes.
A. Yes, I do have.
Q. Can you state how those cases arose?
A. I don't understand your question, counsel.
Q. Was a petition filed?
A. Yes, a petition was filed in each case.

The Court: What petition, by whom?

By Mr. Maxwell:

Q. By whom were the petitions filed, Mr. Gardner?
A. There was a petition filed by Ben Blue, a petition filed by Merry-Go-Round, Inc. and a petition filed by Axie Blue.
Q. As a matter of fact, it was a joint petition filed on behalf of Ben Blue and Axie Blue for the years 1958 and 1959?
[fol. 189] A. That is correct.
Q. And a separate petition filed for Ben Blue for the year 1960?
A. That is correct.
Q. And a separate one filed for Axie Blue for 1960?
A. That is correct.
Q. And then one petition on behalf of Merry-Go-Round, Inc. for the years 1958 to 1960?
A. That is correct.

The Court: The tax years involved in this Indictment are 1958, 1959 and 1960?
Mr. Maxwell: Yes, sir. And the Indictment involves the income taxes of Ben and Axie Blue for the years 1958 and 1959, Ben Blue for the year 1960, and Merry-Go-Round, Inc. for each of the years 1958 to 1960.
Q. Were these petitions filed as a result of a jeopardy assessment, Mr. Gardner?

Mr. Schulman: Objection, your Honor. That would ask of this witness as to why the petitions were filed.
The Court: The objection is sustained.
Had there been a jeopardy assessment made?

By Mr. Maxwell:

Q. Had there been a jeopardy assessment?
A. Prior to the filing of the petition?
Q. Yes.
[fol. 190] A. Yes, there had been.
The Court: What was the date of this?
The Witness: I don't have the exact date, your Honor.

By Mr. Maxwell:

Q. If I tell you it was made on or about April 9, 1963, would that refresh your recollection?
Mr. Schulman: Objection, your Honor. There is no evidence that this witness has anything to do with that jeopardy assessment whatsoever.
Mr. Maxwell: We are trying to get the information.
The Court: Doesn't it show in your records?
The Witness: Yes, it would, your Honor, but I don't have the records here.
Mr. Schulman: We will stipulate as to what the date of the jeopardy assessment was.
The Court: April 9, 1963?
Mr. Schulman: Yes, your Honor.
The Court: Very well.

By Mr. Maxwell:

Q. And the jeopardy assessment was declared to be erroneous and abated in part in June of 1963, Mr. Gardner?
A. I don't have my file here, counsel. I couldnt tell that.
The Court: Do you stipulate to that?
[fol. 191] The Witness: That would be a matter of record.
Mr. Schulman: I object to this as being immaterial, your Honor.
I stipulated in my answer that certain allegations made were true and we conceded these points. As to those points that were conceded I see no reason to go any further here. We certainly didn't concede the materiality, just the fact of their accuracy.
Mr. Maxwell: May I ask the clerk to mark this document for identification, please?
The Court: Have you shown it to counsel? What is it?

Mr. Maxwell: It is a Tax Court petition, your Honor. No, I haven't shown it to counsel. As soon as it is marked, I will.

The Court: Was there a 90-Day Letter?

The Witness: Are you asking me?

The Court: Yes.

The Witness: Well, I wasn't a party to this but after the jeopardy assessment has issued then it follows as a matter of procedure that a 90-Day Letter does issue after the jeopardy assessment has been made within a certain time.

The Clerk: Defendant's Exhibit A marked for identification.

(Document was marked Defendant's Exhibit A for identification.)

[fol. 192] (Exhibiting exhibit to counsel.)

Mr. Maxwell: Mr. Schulman, you have a copy of that petition in your file, I understand.

Mr. Schulman: I don't know what you understand, sir.

Mr. Maxwell: Will you stipulate that you have such a petition?

Mr. Schulman: No, I will not stipulate what the Government files consist of, sir.

By Mr. Maxwell:

Q. Will you tell me what this is, Mr. Gardner?

A. This appears to be a petition in the case of Ben and Axie Blue, docket No. 361263 in the Tax Court of the United States.

Mr. Schulman: There are several other documents attached to that, that I don't believe were filed with the petition as a part of the petition, your Honor, that are attached to this exhibit.

Mr. Maxwell: I think the witness is qualified, your Honor, to describe the exhibit and identify it. Mr. Schulman has had an opportunity to examine it.

The Witness: Is that what you wanted, counsel?

By Mr. Maxwell:

Q. You stated that this is a Tax Court petition.

A. This is a petition filed with the Tax Court.

Q. Is this a copy of one of the petitions assigned to [fol. 193] you?

A. I assume that it is. I haven't checked it but I imagine that it is.

Q. For what year is this?

A. 1958 and 1959.

Q. And there is a document attached to the body of the petition itself?

A. There is a copy of a notice of deficiency for the taxable years 1958 and 1959.

Q. Those are required to be a part of the Tax Court petition and attached, are they not?

Mr. Schulman: Objection, your Honor. That would call for a conclusion of law on the part of this witness.

Mr. Maxwell: This witness is an expert, your Honor.

The Court: Overruled.

The Witness: That is a requirement for filing a petition, yes.

By Mr. Maxwell:

Q. Is that 90-Day Letter attached to the petition the 90-Day Letter that was sent out as a result of a jeopardy assessment?

The Court: What is your question now?

Mr. Maxwell: Is the 90-Day Letter attached to the petition the 90-Day Letter sent out as a result of a jeopardy assessment?

[fol. 194] The Witness: I imagine it is.

By Mr. Maxwell:

Q. Does it so state?

A. It states in the first page of the copy of the notice of deficiency that such is the case.

Q. Now does your office receive copies of these petitions when they are filed, Mr. Gardner?

A. Does my office receive copies of the petition?

Q. Yes.

A. Yes.

Q. If there is a criminal case pending within the Internal Revenue Service, what do they do, do they send copies of the petition to be associated with the criminal file?

Mr. Schulman: Objection, your Honor. That is immaterial and irrelevant to the scope of these proceedings.

The Court: Overruled.

The Witness: Are you speaking of this case, counsel? I am not sure that I understand the question. I am not trying to fight you.

By Mr. Maxwell:

Q. I asked you what the general procedure is when a criminal case is pending and you receive a Tax Court petition——

The Court: Not when a criminal case is pending. You mean when a criminal investigation is pending.

[fol. 195] By Mr. Maxwell:

Q. When a criminal investigation of any kind is pending, do you send copies of the petitions to be associated with the criminal file?

A. May I ask, are you considering whether a case is pending with the Department of Justice?

Q. Wherever the criminal case may be pending.

The Court: Well, I do not understand that. I wish you would clarify it.

Let me first of all establish whether or not this is true. In the hierarchy of the Internal Revenue Bureau you have Deputy Collectors and then you have Agents, is that right?

The Witness: That is correct.

The Court: The Agents are more or less auditors.

The Witness: Yes.

The Court: Then you have Special Agents.

The Witness: Yes.

The Court: When the matter goes to the Special Agent that is for investigation of possible criminal violation.

The Witness: I am not an expert in that field, judge, but I am aware in general that generally that would be true.

The Court: When an investigation has commenced by [fol. 196] any Special Agent of a possible criminal violation, that is the period that you are speaking about now, after that is commenced are you notified?

The Witness: Well, I am not—I couldn't answer that. It may be and it may not be. If we are notified then certain steps are taken.

By Mr. Maxwell:

Q. All right. If you are notified, Mr. Gardner, what steps do you take?

A. And where is it, in the Special Agent's hands?

Q. Let us say in the Special Agent's hands.

A. We attempt to coordinate.

Q. What do you mean, you "attempt to coordinate?"

A. Well, the matter would be handled by our Enforcement Division, it would be coordinated with the Enforcement Division of the Regional Counsel's office, and I am not in that Enforcement Division so I don't know what steps there would be, but that is what I would do, I would coordinate with the Enforcement Division.

The Court: By "coordinate," you mean you would keep them informed of all documents and papers and any information that came to your attention concerning the matter?

The Witness: Yes.

By Mr. Maxwell:

Q. Would you forward to the Special Agent through the [fol. 197] Enforcement Section copies of the Tax Court petitions?

A. I am sorry but I don't know what the Enforcement counsel would do. I just don't know.

Q. Now let us take where a criminal investigation has been concluded by the Special Agent and it has been forwarded to the Regional Counsel and you receive the Tax Court petitions, knowing of the criminal case, would you forward copies of the Tax Court petition to the Regional Counsel?

Mr. Schulman: Objection, your Honor. I understood that the questions for this witness were going to be related to a petition and a statement of facts supposedly containing incriminatory material.

The Court: He just said he doesn't know, that all he does is refer it to the Enforcement counsel.

Is that right?

The Witness: Yes, sir.

The Court: You have somebody called the Enforcement counsel?

The Witness: Yes, we do have, judge.

The Court: You would transmit to the Enforcement counsel copies of the petition?

The Witness: Yes.

The Court: And any other information you had?

The Witness: Any type of pleading, yes. We attempt to coordinate and take our instructions from them.

[fol. 198] The Court: What the Enforcement officer does after that you don't know?

The Witness: I can't say now. I don't know, no, I don't.

By Mr. Maxwell:

Q. What is the general procedeure in your office, Mr. Gardner?

Mr. Schulman: My objection is the same as to that, your Honor. I think he has answered that. You have got him now up to the Enforcement lawyer and from there he says he doesn't know.

By Mr. Maxwell:

Q. Mr. Gardner, you were formerly an Enforcement lawyer, isn't that correct?

A. Yes, I was.

Q. What did you do with them when you were an Enforcement lawyer?

Mr. Schulman: Objection, your Honor. Again this has nothing to do with the statement of facts or petition which was filed in this proceeding. It is dealing with policy of another matter.

The Court: Overruled.

The Witness: At the time I was Enforcement lawyer, that was about 8 years ago, the procedure may have been changed.

[fol. 199] By Mr. Maxwell:

Q. What was the procedure then, Mr. Gardner?

Mr. Schulman: Objection, your Honor, as to what the procedure was 8 years ago.

The Court: Let us find out what happened. Who is the Enforcement counsel that you forward this to?

The Witness: I myself forwarded the only one I had, and that was in the case of Merry-Go-Round. The other cases I got them after the pleadings were filed in this matter.

The Court: You got them after——

The Witness: After the petition and the answer had been filed in this case.

The Court: You mean in the Tax Court cases?

The Witness: Yes, your Honor.

By Mr. Maxwell:

Q. You mean you were assigned those cases after they had been handled by another attorney in your office?

A. That is correct.

Q. So you didn't hold out but you do have available to you the files, don't you, Mr. Gardner?

A. Oh, yes.

Q. Would those files disclose whether or not the Tax Court petition was forwarded to the Special Agent by the Enforcement counsel?

Mr. Schulman: Objection, your Honor.

[fol. 200] The Court: Overruled.

The Witness: Was forwarded to the Special Agent?

Mr. Maxwell: Yes.

The Witness: I don't think they do, counsel, I don't think they disclose that.

By Mr. Maxwell:

Q. At the time you received the petition in Merry-Go-Round, where was the criminal case pending?

A. With the Department of Justice.

Q. When did you receive the petition?

A. The petition in Merry-Go-Round?

Q. Yes.

A. It was filed on July 29, 1963.

Q. At that time the criminal case was pending in the Department of Justice, was it?

A. I don't know. At that time I didn't have the case. The case was not assigned to me as yet.

The Court: What does the file show?

The Witness: I don't know. I don't have that information. Whatever the record shows I will agree with.

Mr. Maxwell: Your Honor, may I ask that the witness be requested to secure his file? I understood he was going to bring his file this morning.

The Court: Do you have your file here?

The Witness: I don't have it here, your Honor.

[fol. 201] The Court: Where is it?

The Witness: It is in the Subway Terminal Building.

The Court: We will excuse you while you go down and get it in both of these matters.

The Witness: I understood—may I say this?

Mr. Maxwell: You can say anything you want.

The Witness: The only thing I understood I was to do was to explain the procedure, that the pleadings that we have we coordinate with the Enforcement Division, and it is a matter of record that they are forwarded to the Department of Justice.

The Court: And this was done?

The Witness: There is no question about that.

The Court: And this was in the Department of Justice when the petition was filed?

The Witness: Well, that is a specific question I can't answer, but in this case the pleadings are forwarded for information purposes.

Is there anything more you want than that, counsel?

Mr. Maxwell: Yes, your Honor. I want to know what his procedure is when a case is with the Intelligence Division because that is where the case was at the time he received it, at the time counsel received the Tax Court petitions.

The Court: He stated, or I misunderstood him, I understood him to say that when the petitions were filed by [fol. 202] the taxpayers in this case the case had already been referred to the Department of Justice Criminal Division.

The Witness: I stated, your Honor, I believe, that I didn't know whether it had been forwarded and that if it

were with the—he asked me whether I knew what happened when it was with the Intelligence Division.

The Court: I understood you to say just a moment ago, and I made a note of it, that the criminal case was pending in the Department of Justice on July 29, 1963 when you received the petition in the Tax Court.

The Witness: That is what I didn't know. What I did state was that the petition was filed on July 29, 1963, and he asked me if I knew whether or not at that time it was pending with the Department of Justice, and I didn't know.

Mr. Maxwell: At this time, your Honor, I will ask Mr. Schulman to stipulate that the Tax Court pleadings, the petitions and the answers, of Ben Blue, Axie Blue and Merry-Go-Round, Inc. are contained in his files as an integral part of the criminal case.

Mr. Schulman: I won't stipulate to that, your Honor, because I don't know. I won't stipulate that it is in the file, and whether or not it was in the file, whether or not it is an integral part of the file, whatever that means.

Again I take the position that all of this is completely outside the scope of these proceedings. If the Govern-
[fol. 203] ment intended to offer this statement of facts that is attached to the petition that your Honor is now looking at, that would be another issue at that time.

Mr. Maxwell: Your Honor, I desire to show that by the actions of the Government in levying a jeopardy assessment and forcing a defendant to make statements of fact concerning his income tax liabilities for 1958 to 1960, no matter what those statements of fact may be, that they have taken unfair advantage of the defendant, and one of the ways in which they take unfair advantage of the defendant is that these pleadings are immediately forwarded for consideration of the Special Agent and anyone else who has anything to do with the criminal case, and they are considered as an integral part of that case, an unseparable portion of the Government's evidence against a defendant.

This is where we say that the Boyd case applies.

Mr. Schulman: Of course it is again the Government's position that he has not shown anywhere that what is in there could or has prejudiced the defendant in the slightest.

Mr. Maxwell: I think the court is well aware of the

decisions that state that any statement of a defendant on a material matter can constitute a link in the chain of evidence against him.

Mr. Schulman: In a question on the ruling of the admission of evidence, but not on a motion to dismiss the [fol. 204] Indictment.

Mr. Maxwell: Even a mere denial in oral conversation with a superior has been held to be a statement.

Mr. Schulman: What case is that, counsel?

Mr. Maxwell: That is in the case of a confession.

The Court: What do you want to get from this witness now? I haven't learned much from him so far, I am frank to confess.

Mr. Maxwell: I haven't either, your Honor.

I would like to get from this witness when the petitions for the Tax Court were filed and when they were forwarded for association with the criminal file.

The Witness: I can give you information as to when they were filed.

The Court: All right. When were they filed with the Tax Court?

The Witness: The petitions?

The Court: Yes.

The Witness: They were all filed on July 29, 1963.

By Mr. Maxwell:

Q. Can you state that copies of the petitions that were forwarded were associated with the criminal file?

A. I don't have that information.

Q. Will your files disclose that?

A. I will look at them and see.

[fol. 205] Could you tell me this, counsel, where the criminal case is at this time?

The Court: That is what he is trying to find out.

Mr. Maxwell: He knows where it is. I believe it was with the Intelligence Division, your Honor.

Mr. Schulman: It was with the Intelligence Division and I can't understand why counsel asked him if it was with the Department of Justice.

Mr. Maxwell: Well, now, Mr. Schulman, I didn't ask him if it was with the Department of Justice, I asked

him where the case was and he said he thought it was with the Department of Justice. Please don't misquote me.

Mr. Schulman: That wasn't my understanding. Again is the witness being asked to bring something particular?

I might volunteer this: I was asked by counsel to ask Mr. Gardner to be here, I was not asked to have Mr. Gardner bring any records.

The Court: What do you keep down there, a docket sheet?

The Witness: We have a file, Judge, that has the pleadings in it.

The Court: Do you have a docket sheet which shows what happens on a certain date?

The Witness: Not as such, but I can pick out the different pleadings.

[fol. 206] The Court: I think you better go down and get the file and be back here at 2:00 o'clock with it. You may step down now.

You know what files to bring?

The Witness: I suppose I better bring them all.

The Court: Not all that you have in your office, just these that relate to Ben and Axie Blue and Merry-Go-Round and—isn't there another corporation mentioned?

The Witness: Not another corporation.

The Court: There isn't? All right.

(Witness temporarily excused.)

Mr. Maxwell: Your Honor, in the meantime I think maybe we would be well served by having Mr. Leslie, who is a Collection Officer, take the stand and advise us of the collection procedure undertaken in jeopardy assessments.

The Court: Very well.

Ralph Leslie, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 207] Direct examination.

* * * * * * *

[fol. 208] By Mr. Maxwell:

Q. Now were these notices of Federal tax liens filed on the same day, Mr. Leslie?

Mr. Schulman: On the same day as what, counsel?

Mr. Maxwell: On each one. There are about six liens there.

Q. Were they all filed on the same day?

A Yes. All the liens filed in relation to the jeopardy assessments were filed on the same day.

Q. What day was that?

A. That was April 12, 1963.

Q. Where were they filed, Mr. Leslie?

A. Los Angeles County Recorder.

Q. Are they still on file?

A. Yes, they are.

Q. Have they in any way been abated?

A. Well, the liens are not in themselves abated.

[fol. 209] Q. Have they been satisfied or shown to be satisfied of record?

A. I think there was one account that was partially abated, and the balance was paid, yes, sir.

Q. Has that been withdrawn from the County Recorder's, that lien? In other words, has a satisfaction of lien been filed?

A. Well, I will have to correct that. This lien against Merry-Go-Round covered four different accounts. One was satisfied, the other three have not been, so a release has not been filed yet.

Q. So all of the liens in Exhibit B are still valid and outstanding so far as your records show?

A. That is correct.

Q. And no satisfaction of any of those liens have been entered?

A. We haven't filed any releases, no.

Q. Now do the tax liens state the amount of tax due?

A. They state the amount of the assessment, yes.

Q. Now was there a portion of the assessment abated in June of 1963 after these liens were filed in April?

A. Yes, there was.

Q. Were the liens refiled to show the amount, a lesser amount of taxes?

A. No, we don't do that. We don't file a release until [fol. 210] the entire amount is paid.

Q. So as far as your office is concerned, you have liens outstanding for the original amount of taxes assessed in April of 1963?

A. There is still filed with the County Recorder as they were filed originally, yes.

Q. They have not been modified in any way?

A. No, they haven't.

Q. In addition to filing the tax liens, did you make levies?

A. Yes, I did.

Q. What levies did you make, and against whom?

A. I levied on the Security First National Bank at 14th and Wilshire.

Q. How do you make a levy, Mr. Leslie?

A. It is a Form 668-A that we serve upon the person who is indebted to the taxpayer.

Q. Do you have one of those that you made in this case?

A. Do I have the levies?

Q. Yes.

A. Yes, I have.

* * * * * * *

[fol 211] EARL GARDNER, called as a witness by and in behalf of the defendant, having been previously duly sworn, resumed the witness stand and testified further as follows:

The Court: You have been at the office and have gotten your file in this matter?

The Witness: Yes, I have, your Honor.

The Court: Go ahead, counsel.

Direct examination (continued).

By Mr. Maxwell:

Q. Now, Mr. Gardner, does your file disclose where the criminal case file was located at the time the petitions were filed to the Tax Court?

A. At the time the petitions were filed?
[fol. 212] Q. Yes.
A. I can guess from the file where it was but there is nothing to indicate plainly where they were, no.
The Court: Is there any indication in your file as to when the criminal investigation began?
The Witness: No, there isn't, your Honor.

By Mr. Maxwell:

Q. Do you have a copy of the Special Agent's report in your file?
A. No, I do not.
Q. Was it ever included as a part of your file?
A. I think it was made available. The file indicates it was made available to the attorney who had the case at the time the petition was filed.
The Court: Is there anything in your file that indicates when you sent the petitions that were filed by the taxpayer to your Enforcement Division?
The Witness: Yes, there is, your Honor. That would be by transmittal of October 17, 1963.
Mr. Maxwell: October 17, 1963?
The Witness: Yes.

By Mr. Maxwell:

Q. In what case?
A. That would be in all cases.
The Court: Is there any indication as to what your [fol. 213] Enforcement Division did with it?
The Witness: No indication.

By Mr. Maxwell:

Q. As a matter of fact, Mr. Gardner, doesn't your file indicate that the enforcement branch of your own office had the criminal file at that time?
A. This is at October 17th?
Q. Yes.
A. At that time, yes.

Q. As a matter of fact, the enforcement branch wrote a memorandum down to your office requesting these copies, did it not?

A I believe—I don't believe there is any such memorandum in the file.

Q. How did you come to send them up to the regional counsel, then?

A. I didn't, Mr. Maxwell.

Q. How did it happen that they were sent then?

The Court: Just as a matter of course?

The Witness: I believe that is the procedure, when they are with the enforcement counsel we coordinate with the enforcement counsel.

By Mr. Maxwell:

Q. But you would have had to have had some basis, you don't send copies of all your pleadings that you receive in [fol. 214] the Tax Court to the enforcement counsel, do you?

A. I believe that we do.

Q. All of them?

A. When the case is with the enforcement counsel I believe we send them all pleadings.

Q. Yes, but you had to know that the case was with the enforcement counsel first before you would send him copies of the pleadings, isn't that right?

A. That is true.

Q. How did you know that in this case? How was that known in this case?

A. The file doesn't disclose that.

The Court: What is the usual course of business?

The Witness: Well, it would be in many ways. The Special Agent could confer with our office here, for example.

The Court: In other words, it could be done orally or in writing?

The Witness: It could be, yes.

The Court: But you do not send your files to the enforcement counsel unless the enforcement counsel makes known their desire to have them or you are advised that they

need them in connection with enforcement proceedings?

A. The minute that we know that there is a case with Enforcement, we do send them the pleadings.

The Court: What do you mean, "Enforcement"?

[fol. 215] The Witness: The enforcement counsel in the office of the Regional Counsel, which is located at the present time in San Francisco.

The Court: Well, what does the enforcement counsel do? When does he step into a tax proceeding, as in this case? Does the enforcement counsel step into a tax proceeding before the—what do you call it, the first step that is taken?

Mr. Maxwell: The Special Agent's report?

The Court: No, the jeopardy assessment and notice of lien.

The Witness: Well, now there is a question. I couldn't answer that, Judge. I could state what happened in this case.

The Court: All right. What happened in this case?

The Witness: In this case the jeopardy assessment, I believe you stated it was in April of 1963?

Mr. Maxwell: That is correct.

The Court: Yes.

The Witness: And the case was forwarded to our office, that is, the Regional Counsel's office, from the Intelligence Division sometime just prior to or in October of 1963. That is the best I can get from this file. These are not accurate.

The Court: Do you have some notion about what the enforcement counsel does? I mean he isn't in every tax [fol. 216] case, is he?

The Witness: He is in every tax case where there is a recommendation of criminal action.

The Court: I see. That is what I mean. He is not in every tax case where there is a notice of lien and levy and jeopardy assessment.

The Witness: Not necessarily, no.

The Court: Very well.

By Mr. Maxwell:

Q. And at this time in October your file discloses that the Regional Counsel was considering a recommendation

for criminal prosecution in the Ben Blue case, is that right?

A. Yes.

Q. Now what is the procedure in your office insofar as these information copies of the Tax Court petitions are concerned, do they stay with the criminal file after you have sent them in?

Mr. Schulman: Your Honor, that would be beyond this witness' scope of knowledge. If he sends it up, that is all he knows.

Mr. Maxwell: He may know, your Honor.

The Court: If he knows. If he doesn't know, he can say so.

The Witness: I don't know what they do, your Honor.

[fol. 217] By Mr. Maxwell:

Q. Do you know what the general procedure is?

A. I don't know what it is now, Mr. Maxwell.

Q. What did it used to be, Mr. Gardner?

Mr. Schulman: If we could have a point of time as to what he means by "used to be."

The Court: Yes, I think that would be a good idea.

By Mr. Maxwell:

Q. You were with the Enforcement Section of the Office for many years, were you not, Mr. Gardner?

A. For 3 or 4 or 5, maybe.

Q. When did you transfer over to the Appellate Section?

A. About 1955 or 1956.

* * * * * * *

[fol. 218] Mr. Maxwell: Let me ask once again Mr. Schul-
[fol. 219] man to stipulate that the copies of the Tax Court pleadings in this case were attached to the criminal file in the Regional Counsel's Office and then went to the Department of Justice with the criminal file and came to his office with the criminal file.

The Court: Came to whose office?

Mr. Maxwell: Until it came to Mr. Schulman's office it was attached to the criminal file.

Mr. Schulman: Your Honor, I don't think that we should properly make such a stipulation, and I have stated that before.

Mr. Maxwell: Well, your Honor, can I ask Mr. Schulman to produce from his files copies of the Tax Court pleadings at this time? I respectfully request the court to make such an order.

The Court: Well, I think that you might be entitled to see the original.

Mr. Schulman: That would be in the Tax Court file.

Mr. Maxwell: The original is in the Tax Court. Of course the problem here is what happens to these copies that were referred to the Enforcement Division of the Regional Counsel's office. I am sure the court is familiar with the procedure, that the Regional Counsel recommends prosecution and that it then goes to the Department of Justice and from there to the United States Attorney's office. [fol. 220] Mr. Schulman: I don't think what is in the Government's file, whether work papers, Special Agents' notes or otherwise, are discoverable under any rule of Federal law.

The Court: I think that if it is a statement by a defendant, a copy of it is.

Mr. Schulman: He has the statement, your Honor. Whether or not it is in my files is immaterial.

The Court: Whether or not it is in your file does become material.

Mr. Schulman: It does become material?

The Court: It does become material.

Mr. Schulman: If what your Honor means, if it is a statement of the defendant he is entitled to see it, he has produced it and he knows what it is.

The Court: But he is entitled to know whether or not it is in your file or just remained in the Tax Court files.

Mr. Schulman: That is the point that I respectfully disagree with the court on.

The Court: I think he is entitled to the production of a copy, if you have it, of your file copy if you have it.

Mr. Schulman: Is your Honor then ordering the Government to open its file for counsel to determine whether or

not it is, or is your Honor ordering the Government to produce from our file particular records?

The Court: Just one copy, if you have it, and that [fol. 221] is the copy of the taxpayer's petition in the Tax Court cases, if you have it.

Mr. Schulman: I would like to ask your Honor one further question. In light of the extensive Bill of Particulars which has been granted in this case, and counsel of course have had wide discovery far and above what they have needed to protect against future double jeopardy——

Mr. Maxwell: I will take issue with that statement, for the record, your Honor.

The Court: Well, all right. We will assume that you take issue with everything he says.

Mr. Schulman: I wonder whether or not counsel is going to be seeking, in this motion later on or in future motions, to determine more about what is or is not in the Government's file.

The Court: I have no idea, counsel, and I cannot reach that until we get to it. All I am saying is that now it has been established that the petitioner, the defendant in this case, did file in the Tax Court before the matter was presented to the Grand Jury a verified petition, and all I am ordering now is that you produce a copy of that petition, if you have it.

Mr. Schulman: I will stipulate, your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the [fol. 222] testimony so far are presently a part of the United States Attorney's case file.

The Court: And came with the Special Agent's report?

Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice.

The Court: Very well. Will you accept the stipulation?

Mr. Maxwell: I accept the stipulation, your Honor.

The Court: Very well. Then it is unnecessary for you to produce such document.

Mr. Schulman: I was going to say that we can dispense with the further testimony then tracing the chain of events; otherwise, we have wasted time with the stipulation.

The Court: Yes, I would think so.

Mr. Maxwell: Yes.

Q. Just one more question, Mr. Gardner. What happens to the case when the Regional Counsel's Enforcement Section makes a decision for prosecution? Does it go to the Department of Justice?

The Court: He just said that it did.

The Witness: It is my understanding that it does. I am not in Enforcement now. It is my understanding that that is what happens.

The Court: Very well. The witness may be excused. [fol. 223] You may take your file with you.

The Witness: Thank you.

(Witness excused.)

Mr. Maxwell: If the court please, may I ask just one question—not of Mr. Gardner, of the court—I have copies of the Tax Court petitions here. These are filed of course with a recognized Board, I believe, and Court, and I ask if the court desires to take judicial notice of them or desires me to produce the documents.

The Court: You have produced them here.

Mr. Maxwell: That is one of them. There are actually four of them.

The Court: I would think that you should produce them.

Mr. Maxwell: Thank you.

The Court: For the limited purposes of this motion.

Mr. Maxwell: Yes, your Honor.

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RALPH LESLIE, called as a witness by and in behalf of the defendant, having been previously duly sworn, resumed the witness stand and testified further as follows:

* * * * * * *

[fol. 224] Direct examination (continued).

By Mr. Maxwell:

Q. The liens are still valid, are they not?

A. They are still on file, yes.

Q. And you could issue today any levy against property belonging to Mr. Blue, is that correct?

A. That is correct.

Q. As a matter of fact, it is your duty to do so if you find some property, isn't that right?

A. Yes, that is right.

Q. So if any property comes to your attention it is part of your duties to make the levy, is that correct?

A. Yes, sir. It is not necessarily a duty. I am not required to make the levy. We haven't touched Mr. Blue's earnings, for example.

Q But there is no reason why you couldn't, though?

A. We would be authorized to do so.

Q. At the time the jeopardy assessment came to you, [fol. 225] did you find that there was a criminal case pending, did you know there was a criminal case pending against Mr. Ben Blue?

The Court: You mean criminal investigation?

Mr. Maxwell: Criminal investigation.

The Witness: Yes, I knew that.

By Mr. Maxwell:

Q. Where did that information come from?

A. I believe it was from Mr. Freeman.

Q. Did Mr. Freeman bring to you the jeopardy assessment in order to have you make the collection and levy?

Mr Schulman: Objection, your Honor, unless counsel is attacking the validity of the jeopardy assessment, which again would be improper in this proceeding.

The Court: Objection sustained.

Mr. Maxwell: Your Honor, I was trying to find out what the procedure was, how this information came to Mr. Leslie's hands. I think it is important.

The Court: He said that Mr. Freeman called him on the phone and told him.

Was that the first you knew about this?

The Witness: Well, I had been advised that the assessments were being made and then after that Mr. Freeman telephoned me.

The Court: He telephoned you and told you of the criminal investigation and of the assets?

[fol. 226] The Witness: Yes.

By Mr. Maxwell:

Q. And of course you were kept informed all the way along that the criminal case has been pending since that time?

Mr. Schulman: Objection, your Honor, as immaterial.

The Court: Sustained.

Mr. Maxwell: That is all I have from Mr. Leslie.

The Court: Any questions?

Mr. Schulman: Just one moment.

(Conference.)

Cross examination.

By Mr. Schulman:

Q. Mr. Leslie, you say there have been no further levies on any earnings of Mr. Ben Blue since the levies that you referred to specifically?

A. That is correct.

Q. Have you been asked not to make any further collections or levies?

The Court: Asked by whom?

Mr. Schulman: By any other branch of the Internal Revenue Service.

The Witness: I have been requested by Intelligence not to make any further collection efforts at this point.

By Mr. Schulman:

Q. And you have made no further collection efforts or [fol. 227] further levies either?

A. No, I have not.

Q. The ones you have described are the only ones?

A. Yes.

Mr. Schulman: Thank you.

Redirect examination.

By Mr Maxwell:

Q. Mr. Leslie, is it your understanding that the Intelligence Division has authority to direct your collection efforts?

A. If an investigation is under way they can request that we not take any action, yes.

Q. Can they also request that you do take action?

A. Yes, I suppose they could do that too.

Q. In other words, when a criminal investigation is under way then you are in the control, so to speak, of the Intelligence Division, is that correct?

Mr. Schulman: Objection, your Honor.

Mr. Maxwell: I think that is a fair summation, your Honor.

The Court: Overruled.

That is, you are subject to orders of the Intelligence Division?

The Witness: Yes, I would say yes to that.

[fol. 228] Mr. Maxwell: That is all.

The Court: What is your position, what is the title of your position?

The Witness: I am a Revenue Officer.

The Court: Revenue Officer?

The Witness: Yes.

The Court: They have changed them then.

The Witness: They used to be, I think, Deputy Collectors.

The Court: Now you are a Revenue Officer?

The Witness: Yes, sir.

By Mr. Maxwell:

Q. But you are still in the Collection Section?

A. Collection Division.

Q. Collection Division?

A. Yes, sir.

Mr Maxwell: Thank you.

Recross examination.

By Mr. Schulman:

Q. Mr. Leslie, when you say you are subject to the orders of the Intelligence Division, are you subject to orders or is this done as a matter of cooperation?

A. I think it is a poor choice of wording. Actually, we are not ordered but we are requested to do or not to do [fol. 229] certain things, and we cooperate.

Q. This isn't a matter of direction, they don't direct the operations of the Collection Division?

A. No.

The Court: Who does?

Mr. Schulman: The local Director.

The Witness: The local Director of course is in charge of the entire District, and then we have a chief of the Collection Division.

Mr. Maxwell: And the Director is also in charge of the Intelligence Division, is he not?

The Witness: Yes.

Mr. Maxwell: That is all.

Mr. Schulman: I have no further questions.

The Court: The local Director is in charge of the Intelligence Division?

The Witness: Well, he is in charge of the entire District.

The Court: Very well. You may step down.

(Witness excused.)

Mr. Maxwell: Your Honor, I have for the record copies of the Tax Court petitions with respect to Merry-Go-Round, Inc. for the years 1958 to 1960 inclusive which I ask be marked as Defendant's Exhibit next in order.

The Clerk: Exhibit D.

[fol. 230] (Documents were marked Defendant's Exhibit D for identification.)

Mr. Maxwell: A petition to the Tax Court in the case of Axie Blue v. Commissioner for the year 1960.

The Clerk: No. E.

(Document was marked Defendant's Exhibit E for identification.)

Mr. Maxwell: A petition to the Tax Court of Ben Blue for the year 1960.

The Clerk: No. F.

(Document was marked Defendant's Exhibit F for identification.)

Mr. Maxwell: I offer Exhibits D to F in evidence.

I think you will find you have copies in your files, Mr. Schulman.

Mr. Schulman: I thought we had gone through this already.

The Court: He can still look at them.

Mr. Schulman: I might just comment that these documents are more than just the petition. I think attached to each one of these is what purports to be the 90-Day Letter.

Mr. Maxwell: Mr. Gardner testified that the 90-Day Letter was an integral part of the petition, and it is, your Honor.

The Court: He testified that it was required to be [fol. 231] attached.

Mr. Schulman: I think it was required to be sent out.

The Court: No, required to be attached to the petition.

Mr. Maxwell: Do you have Exhibit C, Mr. Clerk?

(The exhibit referred to was passed to counsel.)

Mr. Maxwell: Your Honor, I do not believe Exhibit C has been offered in evidence and I will also offer it at this time.

The Court: It is admitted, and so are the others.

Mr. Schulman: My objections, your Honor, are to the materiality and relevancy and in general having absolutely nothing to do with the proceedings before this court on a motion to dismiss an Indictment.

The Court: The objection is overruled. They are all admitted.

(Exhibits marked Defendant's Exhibits C, D, E and F were received in evidence.)

The Court: They are admitted for the limited purposes of this motion only.

Next witness.

Mr. Maxwell: Mr. Robert Lund, head of the Intelligence Division is here, and I would like to ask him to take the stand for a few minutes, your Honor.

[fol. 232] ROBERT K. LUND, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert K. Lund.

The Clerk: And your business address?

The Witness: Room 1726 Post Office and Court House Building, Los Angeles.

Direct examination.

By Mr. Maxwell:

Q. What is your occupation, Mr. Lund?

A. Chief, Intelligence Division, Internal Revenue Service, Los Angeles District.

Q. Mr. Lund, I am going to ask you to advise us as to the policy of the Internal Revenue Service and the Intelligence Division in general as to the levying of civil liabilities in a case where criminal investigation is pending.

The Court: I think you can ask him what the usual course of business is; I don't think you can ask him what the policy is.

Mr. Maxwell: I am sorry, your Honor. I meant to ask him what the usual course of business was.

Mr. Schulman: Your Honor, I would like to object to that on this ground: What was done in this case—I don't see any objection to Mr. Lund testifying—what they [fol. 233] generally do in matters I don't think would be determinative as to whether or not what was done here was in violence of the law. It either was proper or was not proper. What they generally do, I don't think there is any issue as to that, and I think it is also invading the Intelligence Division's own procedural method of operation.

Mr. Maxwell: Your Honor, part of our contentions in this case are to the effect that it is the general business practice of the Internal Revenue Service where criminal investigation is pending and a criminal prosecution is

intended to be undertaken, that no assertion of the civil tax liability of a taxpayer are undertaken prior to the final conclusion of the criminal case.

The Court: I think that is material, Mr. Schulman, to know what the general course of business is, so the objection is overruled.

The Witness: Would you restate your question, please, now?

Mr. Maxwell: Yes, Mr. Lund.

Q. What is the general course of business with respect to the assertion of civil liabilities where criminal investigation is undertaken?

A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of.

The Court: Is that all?

[fol. 234] Mr. Maxwell: Yes, I think that is all, your Honor.

Mr. Schulman: I do have a question.

Cross examination.

By Mr. Schulman:

Q. If the District Collector has a belief that the collection of the revenue will be in jeopardy even though a criminal investigation is underway, is it the policy of the—pardon me—is it the general course of business of the Intelligence Division not to recommend a jeopardy assessment?

Mr. Maxwell: I say that is improper cross examination, your Honor.

Mr. Schulman: Let me rephrase it.

The Court: I think it would be a good idea, because I got lost.

By Mr. Schulman:

Q. Is it the general course of business that you refer to, sir, to refrain from perhaps jeopardy assessments where there is a criminal investigation underway, that is, does that policy hold true if there is a strong belief that the collection of the revenue will be in jeopardy?

Mr. Maxwell: If the court please, that calls for a hypothetical answer on the part of the witness.

The Court: Yes, it does. He was just asked about the [fol. 235] general course of business.

Mr. Schulman: May I have the witness' answer to Mr. Maxwell's question read back then, your Honor?

The Court: Yes. Would you find that, Mr. Reporter.

(The record referred to was read by the reporter as follows:

> "Q. What is the general course of business with respect to the assertion of civil liabilities where criminal investigation is undertaken?
>
> "A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of.")

By Mr. Schulman:

Q. Are there times when civil liabilities are assessed before the criminal matter is disposed of?

A. There have been.

Q. What are the occasions or what are the situations when they are assessed before the criminal matter is disposed of?

A. When the investigating agents determine that the tax might be in jeopardy because the assets might be dissipated or transferred or removed from the jurisdiction of the country.

Q. Then if that situation exists, even though there may be a criminal matter pending, the civil liability may [fol. 236] nevertheless be assessed?

A. It may be.

Mr. Schulman: Thank you.

Redirect examination.

By Mr Maxwell:

Q. Now, Mr. Lund, is this done very often?

A. Well, a situation like that doesn't arise very often. I can't give you any percentage as to the number of times that the situation arises in which we do assess first.

Q. How many times did it arise last year?
A. I couldn't tell you.

Mr. Schulman: Objected to as immaterial. The quantitative determination does not tend to impeach or be of further aid to the court on Mr. Lund's testimony.

Mr. Maxwell: I think it might be, your Honor, in this particular instance.

The Court: I don't know. He may answer the question. If you know.

The Witness: I don't know.

By Mr. Maxwell:

Q. Did it happen in more than one case?
A. I really couldn't tell you. I haven't made any study.
Q. About how many cases do you process in a year, [fol. 237] Mr. Lund?

Mr. Schulman: I object to that as immaterial, your Honor.

The Court: I don't see how it is material.

By Mr. Maxwell:

Q. Do you know of any other case besides the Ben Blue case in the last year that a jeopardy assessment has been levied on after a criminal investigation had been started?
A. I can't recall of any, but there might have been.
Q. Do you review these recommendations?
A. I do.

Mr. Maxwell: That is all.

The Court: You may step down.

* * * * * * *

[fol. 238] Ernest R. Mortenson, called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, for the record.
The Witness: Ernest R. Mortenson.
The Clerk: Your business address?
The Witness: 961 East Green Street, Pasadena.

Direct examination.

By Mr. Maxwell:

Q. You are an attorney, Mr. Mortenson?

A. Yes, I am.

Q Will you state your backgorund in income tax laws and criminal cases in particular.

A. Well, I was two years Special Assistant to the Attorney General of the United States in the Tax Division, Washington, D. C., and I believe eight or nine years in the office of Regional Counsel of the Treasury Department, two years of which I believe I was designated what was then called the District Director, Enforcement.

Q. Since that time have you been engaged in the private practice of law?

A. Yes.

Q. Any particular specialty?

A. I have specialized in taxation.

[fol. 239] The Court: You mean you specialize in taxation or trying to avoid taxation?

The Witness: Well, Justice Holmes said that taxes were the way be buy civilization. I believe in that, but I do not believe anyone should pay any more taxes than he owes.

By Mr. Maxwell:

Q. Have you examined the Bills of Particulars in this case?

A. Yes, I have. There are two Bills of Particulars, the first Bill of Particulars was found by the court not to be in response to the request for the Bill of Particulars and a supplemental one has been filed.

Q. In the course of your occupation with Internal Revenue and the Department of Justice and since you have been in private practice, have you had to handle bank deposit cases?

A. I have reviewed many bank deposit cases as a member of the Regional Counsel's staff. I am the author of a book called "Federal Tax Fraud Law," and there was a section in that book dealing with bank deposit cases as well as net worth cases.

And I believe I have done a considerable amount of research aside from the study of cases.

The Court: Bank deposit cases are what are otherwise [fol. 240] known as in-and-out cases, so much money in and so much money out?

The Witness: Yes, or it is classified as a method of indirect proof rather than specific item or direct proof.

By Mr. Maxwell:

Q. In your review of the Bills of Particulars based upon your experience, what was your opinion as to the necessity for an accountant to assist the attorney who may represent the defendant Ben Blue at the trial?

A. In my opinion it would be impossible to effectively represent a defendant in a bank deposit case such as this one without having an accountant take the stand and explain to the finders of fact or the finder of fact just what the figures meant that were adduced by the Government.

The Court: That would require a prior analysis by him of the years involved?

The Witness: A very careful analysis of every item of deposit in the bank account.

The Court: And every item that went out?

The Witness: That should be done; yes, your Honor.

The Court: Every item that went in and every item that went out and where from.

The Witness: That is right, because otherwise there may be redeposits, there may be deposits of non-taxable income, and there may be deposits that are completely in [fol. 241] error and can be demonstrated to be so.

By Mr. Maxwell:

Q. In addition, it would take an analysis of the cash expenditures of the defendant during the years in question, would it not?

A. Yes.

Q. Because, of course, the cash expenditure would not necessarily have been a deposit in the bank account.

A. That is right, because the bank deposits which are considered by the Government to be income are added on

to expenditures which are not reflected in any of the bank account items.

* * * * * * *

[fol. 242] ARGUMENT IN BEHALF OF THE PLAINTIFF

Mr. Schulman: Basically it is with reference to the citation of authorities, your Honor. I wish to call the court's attention that the cases cited in the reply brief for the proposition that the Federal Court has the power to vacate a criminal proceeding where a jeopardy assessment is used to take unfair advantage of the defendant, for that proposition of law the defense have cited the Rea case, United States v. Heath, and McNabb v. United States. I think a reading of those cases will show——

The Court: I think it is evident from both parties' briefs that there is no case squarely in point except the Brodson case.

[fol. 243] Mr. Schulman: Brodson, O'Connor and Summers I think are all close.

The Court: I think the O'Connor and Summers case are not squarely in point, and as I stated, I do not agree with the Seventh Circuit and their ruling on the Brodson case, that a defendant has to wait until after the trial is over before an examination can be made as to whether or not he was properly represented or whether or not he has been unfairly put on trial. The reasoning in that case if it were followed would certainly preclude the courts from ever granting any motion to suppress evidence.

Mr. Schulman: Of course that wasn't raised on a motion to suppress.

The Court: I know it was not raised on a motion to suppress.

In the Summers case the court there stated that there was no showing that there was a necessity for an accountant in order for the lawyer to render effective service, and that case can be distinguished on that ground and, moreover, it was long prior to the opinion by Judge Fee in United States v. Heath in the Ninth Circuit.

In the O'Connor case, that is not applicable here because there were 22 months after the Indictment was returned

before the jeopardy assessment was levied and the court said that it is manifest that during all this long preliminary [fol. 244] period the defendant had full opportunity to prepare his defense as well as opportunity after the levying of the assessment to bring that circumstance to the attention of the court.

So there the assets were not tied up, they were free for 22 months after the Indictment was filed.

Here the jeopardy assessment was made before the Indictment was filed, it was made under the uncontradicted testimony of Mr. Mortenson and his uncontradicted affidavit that he was advised in November 1962 that a recommendation would be made for criminal prosecution and the jeopardy assessment was not levied until the following April. So there isn't any doubt but what the Government was proceeding on a collision course with this defendant criminally before the jeopardy assessment was levied.

The question that has disturbed me somewhat as I first glanced at these papers, so much so that I came down yesterday and spent the day trying to resolve some of the questions of law, in view of the fact that the defendant has earned a substantial amount of money in the year 1964 it would seem to me that the court would not be justified in granting the motion to dismiss because he was deprived of his right to counsel, and the testimony is that he has engagements.

Of course I realize that it is true that under the law the Director of Internal Revenue may impose liens or [fol. 245] distraints—I guess they call them "liens" now, they used to call them "distraints"—at any time, so I don't think that the defendant would be entitled to a dismissal on that ground.

I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or

whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, [fol. 246] that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

Mr. Schulman: May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to, nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.

The Court: I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.

Mr. Schulman: Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't [fol. 247] know if that evidence would be offered or the

Government has now said that it is telling the court it would not offer such evidence, and without that admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?

The Court: I think so, counsel. It is a very narrow ruling and I would like very much to see the matter taken up on appeal and tested, because it is a case of first impression, it is a novel and unusual question, and I take it that if an appeal becomes necessary here perhaps the Government might stipulate to release sufficient funds to permit counsel to represent him on appeal.

Mr. Schulman: Very well. May I have the court's indulgence for just one moment?

The Court: Yes.

(Conference between counsel.)

Mr. Schulman: Your Honor, just one question?

The Court: Yes.

Mr. Schulman: If the Government were able to stipulate that certain funds might be released to pay counsel, this would have nothing to do with the court's ruling on the other issue now made?

The Court: That is right. I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel. I do know, and [fol. 248] as you and we all know, the Government may at any time file a lien against earnings, they may file an order of distraint, so they could completely make him impotent financially in the event of an appeal by the Government from this ruling, which I earnestly hope will be taken so that we may establish what the law is in this field.

Mr. Schulman: Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——

The Court: And followed by an Indictment.

Mr. Schulman: —and followed by an Indictment——

The Court: Yes.

Mr. Schulman: —then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.

The Court: That is right. I think I have framed my ruling narrowly enough so that the Appellate Court will be able to catch on to it. If they don't, they will frame one of their own.

Mr. Schulman: Your Honor is not going to write an opinion on this?

[fol. 249] The Court: No, I have too much else to do. I am sorry. All I am suggesting is that in the event you do take an appeal that the Government give consideration either to a stipulation that they will not levy a distraint against sufficient money for him to hire counsel to defend him on that appeal.

Mr. Schulman: Well, it may well be that such might be worked out, your Honor, and I suppose if an appeal is in order that the time to determine that will be after the matter is back in the District Court, if it is back in the District Court.

The Court: Well, I think the time to determine it would be while the matter is on appeal. I imagine that the Internal Revenue Bureau and the Department of Justice will probably want to take an appeal here. At least I earnestly hope they do take an appeal.

Mr. Maxwell: Is bail exonerated, your Honor?

The Court: Bail is exonerated.

The Clerk: And counsel will prepare an order?

The Court: No.

The Clerk: Can he appeal from a Minute Order?

The Court: Yes, he can appeal from a Minute Order and an order. I suppose counsel better secure a copy of the transcript and file it.

Mr. Schulman: Is your Honor discussing the consti-[fol. 250] tutionality in deciding this?

The Court: No.

Mr. Schulman: You are not saying what rights of the defendant have been violated here.

The Court: Yes, I am.

Mr. Schulman: This is what confuses me.

The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case.

Mr. Schulman: Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?

Mr. Mortenson: With what?

Mr. Schulman: That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.

Mr. Maxwell: They have levied on all his assets, your Honor. That wasn't enough to pay the tax.

The Court: I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient [fol. 251] money to pay the tax, and I will draw that inference.

Mr. Schulman: Very well.

The Court: Court is adjourned.

(Whereupon, at 4:30 o'clock p.m., court was adjourned.)

[fol. 252] CERTIFICATE

No. 33950 CD

UNITED STATES OF AMERICA, Plaintiff

v.

BEN BLUE, Defendant

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing 150 pages is a true and correct transcript of the proceedings had in the above-

entitled cause on the date specified herein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of February, 1965.

Agnar Wahlberg
Official Court Reporter

[fol. 253] DEFENDANT'S EXHIBIT A

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3612-63

BEN AND AXIE BLUE, Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioners hereby petition for a redetermination of the deficiencies set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding allege as follows:

1. The Petitioners herein are Ben and Axie Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue in Los Angeles, California. The notice of defieciency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioners on June 6, 1963.

3. The deficiencies as determined by the Commissioner for income taxes and penalties are for the calendar years 1958 and 1959 in the following amounts:
[fol. 254]

Year	*Deficiency*	*Penalty Sec.* 6653(b)
1958	$ 9,172.51	$ 4,586.26
1959	20,492.94	10,246.47
	$29,665.45	$14,832.73

The entire deficiencies and all of the penalties are in dispute.

4. The determination of the deficiencies and penalties set forth are based upon the following errors:

1958

a. The Commissioner erred in determining that the Petitioners received dividend distributions in the amount of $18,256.56 in the taxable year 1958 which they failed to report.

b. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1958 was due to fraud with the intent to evade tax.

1959

c. The Commissioner erred in determining that the Petitioners received dividend distributions in the amount of $33,544.12 in the taxable year 1959 which they failed to report.

d. The Commissioner erred in determining that the Petitioners received additional income from Dorchester Music Company in the amount of $3,450.00.

e. The Commission erred in disallowing part of the $2,905.75 claimed on the income tax return as medical expense for the year 1959.

f. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1959 was due to fraud with the intent to evade tax.

[fol. 255] 5. The facts upon which Petitioners rely as a basis for this proceeding are as follows:

1958

a. The Petitioners reported and paid taxes on any dividend distributions received by them in the taxable year 1958.

b. No part of the deficiency determined by the Commissioner for the taxable year 1958 was due to fraud with the intent to evade tax on the Petitioners' part.

1959

c. The Petitioners reported and paid taxes on any dividend distributions received by them in the taxable year 1959.

d. The Petitioners received no income from Dorchester Music Company in any amount that was not reported on their Federal income tax return filed for the taxable year 1959.

e. The Petitioners paid the medical expenses claimed on their income tax return filed for the year 1959 which they were permitted to deduct from their gross income.

f. No part of the deficiency determined by the Commissioner for the taxable year 1959 was due to fraud with the intent to evade tax on the Petitioners' part.

WHEREFORE, Petitioners pray that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioners.

/s/ Ernest R. Mortenson
Ernest R. Mortenson

Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 256] VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss.

BEN BLUE, being duly sworn, deposes and says:

That he is the Petitioner above-named;
That he has read the foregoing Petition and is familiar with the statements contained therein, and
That the statements contained therein are true, except those stated to be upon information and belief, and that these he believes are true.

/s/ BEN BLUE
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays
Notary Public in and for said
County and State

[fol. 257] VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

AXIE BLUE, being duly sworn, deposes and says:

That she is the Petitioner above-named;
That she has read the foregoing Petition and is familiar with the statements contained therein, and
That the statements contained therein are true, except those stated to be upon information and belief, and that these she believes are true.

/s/ AXIE BLUE
Axie Blue

Subscribed and sworn to before me this 22nd day of July, 1963.

ETHEL B. LEACHMAN
Notary Public in and for said
County and State

[fol. 258] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

Taxable Years Ended	*Deficiency*	Code Section 6653(b) *Penalty*
December 31, 1958	$ 9,172.51	$ 4,586.26
December 31, 1959	$20,492.94	$10,246.47

Dear Mr. and Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 259] EXHIBIT A

STATEMENT

Code 411:90D:TC

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Years Ended
December 31, 1958
December 31, 1959

Summary of Deficiencies

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income tax	$ 9,172.51	$ 4,586.26
1959	Income tax	20,492.94	10,246.47
Total		$29,665.45	$14,832.73

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments on April 9, 1963 for the taxable years ended December 31, 1958 and December 31, 1959

Year		*Deficiency*	*Penalty*	*Interest to 4-9-63*
1958	Income tax	$12,023.18	$ 6,011.59	$2,874.86
1959	Income tax	28,015.27	14,007.64	5,017.80
Total		$40,038.45	$20,019.23	$7,892.66

[fol. 260] It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

Year	*Assessment in excess of liability*	
	Income tax	*Penalty*
1958	$ 2,850.67	$1,425.33
1959	7,522.33	3,761.17
Total	$10,373.00	$5,186.50

It is determined that all or part of the underpayment of tax required to be shown on the return for each of the taxable years ended December 31, 1958 and December 31, 1959 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted for each year.

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

It is determined that you received dividend distributions in each of the taxable years ended December 31, 1958 and

December 31, 1959 which you failed to report in your return for each of the aforementioned years. Accordingly, your taxable income is increased $18,256.56 for the taxable year ended ecember 31, 1958 and $33,544.12 for the taxable year ended December 31, 1959, computed as follows:

	Taxable Years Ended	*12-31-59*
Total dividend distributions received	$18,356.56	$33,644.12
Less: Allowable dividend exclusion	100.00	100.00
Increase in income	$18,256.56	$33,544.12

[fol. 261] ADJUSTMENT TO INCOME

Taxable year ended December 31, 1958

Taxable income as disclosed by return	$30,761.66
Additional income:	
(a) Income from dividends	18,256.56
Taxable income adjusted	$49,018.22

EXPLANATION OF AJUSTMENT

(a) This adjustment has been previously explained herein.

COMPUTATION OF TAX

Taxable year ended December 31, 1958

Taxable income adjusted	$49,018.22
Tax on $49,018.22	$19,720.75
Less: Dividends received credit (4% of $18,256.56)	730.26
Correct income tax liability	$18,990.49
Income tax liability shown on return, account No. BP 2000038	9,817.98
Deficiency of income tax	$ 9,172.51
Section 6653(b) penalty 50% of $9,172.51	$ 4,586.26

[fol. 262] ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1959

Taxable income as disclosed by return		$28,372.98
Additional income and unallowable deductions:		
(a) Income from dividends	$33,544.12	
(b) Additional compensation	3,450.00	
(c) Medical expense	1,109.82	38,103.94
Taxable income adjusted		$66,476.92

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.

(b) It is determined that you received compensation in the amount of $3,450.00 from Dorchester Music Company which you failed to report in your return. Accordingly, your taxable income is increased $3,450.00.

(c) Due to the increase in your adjusted gross income a deduction for medical expense in the amount of $1,795.93 is allowable in lieu of the $2,905.75 claimed in your return. Accordingly, your taxable income is increased $1,109.82.

COMPUTATION OF TAX

Taxable year ended December 31, 1959

Taxable income adjusted	$66,476.92
Tax on $66,476.92	$30,530.00
Less: Dividends received credit (4% of $33,544.12)	1,341.76
Correct income tax liability	$29,188.24
Income tax liability shown on return, account No. BF 1512	8,695.30
Deficiency of income tax	$20,492.94
Section 6653(b) penalty 50% of $20,492.94	$10,246.47

[fol. 263] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director
Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Mr. Ben Blue and
Mrs. Axie Blue
Husband and Wife
817 North Roxbury Drive
Beverly Hills, California

		Code Section 6653(b)
Taxable Years Ended	*Deficiency*	*Penalty*
December 31, 1958	$ 9,172.51	$ 4,586.26
December 31, 1959	$20,492.94	$10,246.47

Dear Mr. and Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 264] DEFENDANT'S EXHIBIT D

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3615-63

MERRY-GO-ROUND, INC., Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Merry-Go-Round, Inc., a California corporation, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties are for the calendar years 1958 to 1960, inclusive, in the following amounts:

[fol. 265] *Summary of Deficiencies*

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income Tax	$12,317.76	$ 6,158.88
1959	Income Tax	39,287.18	19,643.59
1960	Income Tax	24,906.60	12,453.30
Total		$76,511.54	$38,255.77

The entire deficiencies and all of the penalties are in dispute.

4. The determination of deficienceis and penalties set forth in said deficiency notice are based upon the following errors:

1958

a. The Commissioner erred in determining that the Petitioner had unreported income in the amount of $13,728.01 or any other sum.

b. The Commissioner erred in disallowing $9,959.99 which were claimed by Petitioner in arriving at the cost of goods sold.

c. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1958 was due to fraud on the Petitioner's part with an intent to evade tax.

1959

d. The Commissioner erred in determining that the Petitioner had unreported income in the amount of $45,642.04 for the taxable year 1959.

e. The Commissioner erred in disallowing $12,234.31 which were claimed by Petitioner in arriving at the cost of goods sold.

f. The Commissioner erred in disallowing rental expense in the amount of $13,518.38 for the taxable year 1959.

[fol. 266] g. The Commissioner erred in disallowing automobile depreciation in the amount of $3,259.52 for the taxable year 1959.

h. The Commissioner erred in disallowing automobile expense in the amount of $1,036.67 for the taxable year 1959.

i. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1959 was due to fraud on the Petitioner's part with an interest to evade tax.

1960

j. The Commissioner erred in determining that there was unreported income in the amount of $26,614.66 for the taxable year 1960.

k. The Commissioner erred in disallowing $11,202.20 which were claimed by Petitioner in arriving at the cost of goods sold.

l. The Commissioner erred in disallowing rental expense in the amount of $16,086.23 for the taxable year 1960.

m. The Commissioner erred in disallowing automobile depreciation in the amount of $1,926.00 for the taxable year 1960.

n. The Commissioner erred in disallowing automobile expense in the amount of $1,493.53 for the taxable year 1960.

o. The Commissioner erred in determining that all or a part of the deficiencies for the taxable year 1960 was due to fraud on the Petitioner's part with an intent to evade tax.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

[fol. 267] 1958

a. The Petitioner reported its entire income for the year 1958 on its Federal income tax return filed for that year and it failed to report no income of any kind derived by it during the year 1958.

b. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

c. No part of the deficiency assessed by the Commissioner for the taxable year 1958 is due to fraud on the Petitioner's part with an intent to evade tax.

1959

d. The Petitioner reported its entire income for the year 1959 on its Federal income tax return filed for that year and it failed to report no income of any kind derived by it during the year 1959.

e. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

f. The deductions taken for rental expense for the year 1959 constituted ordinary and necessary business expense.

g. The deductions taken for depreciation on automobile constitutes ordinary and necessary business expense.

h. The deductions taken for automobile expense constitute ordinary and necessary business expense.

i. No part of the deficiency assessed by the Commissioner for the taxable year 1959 is due to fraud on the Petitioner's part with an intent to evade tax.

[fol. 268] 1960

j. The Petitioner reported its entire income for the year 1960 on its Federal Income Tax Return filed for that year and it failed to report no income of any kind derived by it during the year 1960.

k. The purchases claimed on the income tax return in arriving at the cost of goods sold were correctly and properly entered on said return.

l. The deductions taken for rental expense for the year 1960 constituted ordinary and necessary business expense.

m. The deductions taken for depreciation on automobile constitutes ordinary and necessary business expense.

n. The deductions taken for automobile expense constitute ordinary and necessary busniess expense.

o. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioner.

/s/ Ernest R. Mortenson
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 269] VERIFICATION

State of Nevada)
County of Clark) ss.

Ben Blue, being duly sworn, says that he is the President of the above-named corporation and that he is duly authorized to verify the foregoing petition, that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that these he believes to be true.

/s/ Ben Blue
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays

Notary Public in and for said
County and State

[fol. 270] SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Received June 12, 1963

Merry-Go-Round, Inc.
c/o Ernest R. Mortenson
961 East Green Street
Pasadena, California

Taxable Year Ended	*Deficiency*	*Penalty Code Section 6653(b)*
December 31, 1958	$12,317.76	$ 6,158.88
December 31, 1959	$39,287.18	$19,643.59
December 31, 1960	$24,906.60	$12,453.30

Gentlemen:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the

above-noted taxable years discloses deficiencies in tax and penalties in the amounts shown above. Assessment of the deficiencies has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiencies.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 271] STATEMENT

Code 411:90D:TC

Merry-Go-Round, Inc.
c/o Ernest R. Mortenson
961 East Green Street
Pasadena, California

Tax Liability for the Taxable Years Ended

December 31, 1958

December 31, 1959

December 31, 1960

Summary of Deficiencies

Year		*Deficiency*	*Penalty Sec. 6653(b)*
1958	Income Tax	$12,317.76	$ 6,158.88
1959	Income Tax	39,287.18	19,643.59
1960	Income Tax	24,906.60	12,453.30
Total		$76,511.54	$38,255.77

[fol. 272] *Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments on April 9, 1963 for the taxable years ended December 31, 1958, December 31, 1959 and December 31, 1960*

Year		*Deficiency*	*Penalty*	*Interest to 4-9-63*
1958	Income tax	$13,861.73	$ 6,930.87	$ 3,383.78
1959	Income tax	41,610.73	20,805.37	7,660.93
1960	Income tax	28,460.58	14,230.29	3,532.23
Total		$83,933.04	$41,966.53	$14,576.94

It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent that they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

	Assessment in excess of liability	
Year	*Income tax*	*Penalty*
1958	$1,543.97	$ 771.99
1959	2,323.55	1,161.78
1960	3,553.98	1,776.99
Total	$7,421.50	$3,710.76

It is determined that all or part of the underpayment of tax required to be shown on the returns for the taxable years ended December 31, 1958, December 31, 1959 and December 31, 1960 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted for each year.

It is determined that you had unreported taxable income in the amount of $13,728.01 for the taxable year ended December 31, 1958, $45,642.04 for the taxable year ended December 31, 1959 and $26,614.66 for the taxable year ended December 31, 1960. Your taxable income for each of the aforementioned years is increased accordingly.

[fol. 273] The deduction for purchases claimed in arriving at your cost of goods sold is disallowed to the extent of $9,959.99 for the taxable year ended December 31, 1958, $12,234.31 for the taxable year ended December 31, 1959 and $11,202.20 for the taxable year ended December 31, 1960 because it has not been established that these amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Your taxable income for each of the aforementioned years is increased accordingly.

The deduction claimed for rental expense is disallowed to the extent of $13,518.38 for the taxable year ended December 31, 1959 and $16,086.23 for the taxable year ended December 31, 1960 because it has not been established that the amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Therefore, your taxable income is increased $13,518.38 for the taxable years ended December 31, 1959 and $16,086.23 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Total rental expense claimed	$33,864.38	$37,686.23
Total rental expense allowed	20,346.00	21,600.00
Total disallowed	$13,518.38	$16,086.23

It is determined that the depreciation on an automobile claimed in the total amount of $3,259.52 in your return for the taxable year ended December 31, 1959 and $1,926.00 in your return for the taxable year ended December 31, 1960 is not deductible under any provision of the Internal Revenue Code. Accordingly, your taxable income is increased $3,259.52 for the taxable year ended December 31, 1959 and $1,926.00 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Depreciation on automobile claimed	$3,259.52	$1,926.00
Depreciation on automobile allowed	—0—	—0—
Total disallowed	$3,259.52	$1,926.00

[fol. 274] The deduction claimed for automobile expense* is disallowed in the total amount of $1,036.67 for the taxable year ended Deecember 31, 1959 and $1,493.53 for the taxable year ended December 31, 1960 because it has not been established that the amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Accordingly, your taxable income is increased $1,036.67 for the taxable year ended December 31, 1959 and $1,493.53 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Total automobile expense claimed	$1,036.67	$1,493.53
Total automobile expense allowed	—0—	—0—
Total disallowed	$1,036.67	$1,493.53

*Shown as automobile allowances in your return for the taxable year ended December 31, 1960.

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1958

Taxable income as disclosed by return		$25,602.19
Additional income and unallowable deductions:		
(a) Unreported income	$13,728.01	
(b) Purchases	9,959.99	23,688.00
Taxable income adjusted		$49,290.19

EXPLANATION OF ADJUSTMENTS

(a) and (b) These adjustments have been previously explained herein.

[fol. 275] COMPUTATION OF TAX

Taxable year ended December 31, 1958

Taxable income adjusted		$ 49,290.19
Combined normal tax and surtax:		
52% of $49,290.19	$25,630.90	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$ 20,130.90
Correct income tax liability		$ 20,130.90
Income tax liability shown on return, Account No. CI 202227		7,813.14
Deficiency of income tax		$ 12,317.76
Section 6653(b) penalty 50% of $12,317.76		$ 6,158.88

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1959

Taxable income as disclosed by return		$ 24,672.28
Additional income and unallowable deductions:		
(a) Unreported income	$45,642.04	
(b) Purchases	12,234.31	
(c) Rental expense	13,518.38	
(d) Depreciation on automobile	3,259.52	
(e) Automobile expense	1,036.67	75,690.92
Taxable income adjusted		$100,363.20

EXPLANATION OF ADJUSTMENTS

(a), (b), (c), (d) and (e) These adjustments have been previously explained herein.

[fol. 276] COMPUTATION OF TAX

Taxable year ended December 31, 1959

Taxable income adjusted		$100,363.20
Combined normal tax and surtax:		
52% of $100,363.20	$52,188.86	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$ 46,688.86
Correct income tax liability		$ 46,688.86
Income tax liability shown on return, Account No. CI202544		7,401.68
Deficiency of income tax		$ 39,287.18
Section 6653(b) penalty 50% of $39,287.18		$ 19,643.59

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$ 3,736.85
Additional income and unallowable deductions:		
(a) Unreported income	$26,614.66	
(b) Purchases	11,202.20	
(c) Rental expense	16,086.23	
(d) Depreciation on automobile	1,926.00	
(e) Automobile allowances	1,493.53	57,322.62
Total		$61,059.47
Decrease in income:		
(f) Contributions		429.35
Taxable income adjusted		$60,630.12

[fol. 277] EXPLANATION OF ADJUSTMENTS

(a), (b), (c), (d), and (e) These adjustments have been previously explained herein.

(f) Due to the increase in your taxable income as a result of adjustments (a), (b), (c), (d), and (e) you are allowed a deduction for contributions in the amount of $626.03 in lieu of the $196.68 claimed in your return. Accordingly, your taxable income is decreased $429.35.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

Taxable income adjusted		$60,630.12
Combined normal tax and surtax:		
52% of $60,630.12	$31,527.66	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$26,027.66
Correct income tax liability		$26,027.66
Income tax liability shown on return, Account No. CF202624		1,121.06
Deficiency of income tax		$24,906.60
Section 6653(b) penalty 50% of $24,906.60		$12,453.30

[fol. 278] DEFENDANT'S EXHIBIT E

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3614-63

AXIE BLUE, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D-TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Axie Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The return for the period here involved was filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties is for the calendar year 1960 in the following amount:

[fol. 279]	*Deficiency*
Income Tax	$5,246.81

4. The determination of the deficiency set forth in said deficiency notice is based upon the following errors:

1960

a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which she did not report on her return for the year 1960.

b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.

c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

a. Petitioner received no dividened distributions which she failed to report on her return.

b. Petitioner received no distributions taxable as long

term capital gains which she failed to report on her return.

c. Expenses deducted for the use of a separate office in the Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

[fol. 280] WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due from the Petitioner.

/s/ ERNEST R. MORTENSON
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

AXIE BLUE, being duly sworn, deposes and says:

That she is the Petitioner above-named;

That she has read the foregoing Petition and is familiar with the statements contained therein, and

That the statements contained therein are true, except those stated to be upon information and belief, and that these she believes are true.

/s/ AXIE BLUE
Axie Blue

Subscribed and sworn to before me this 22nd day of July, 1963.

ETHEL B. LEACHMAN
Notary Public in and for said
County and State

[fol. 281] EXHIBIT A

P.O. Box 201—Main Office

Los Angeles 53, California

June 6, 1963

Code 411:90D:TC Phone 688-4183

CERTIFIED MAIL

Received June 10, 1963

Mrs. Axie Blue
817 North Roxbury Drive
Beverly Hills, California

Taxable Year Ended	*Deficiency*
December 31, 1960	$5,246.81

Dear Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the taxable year ended December 31, 1960 discloses a deficiency in tax in the amount shown above. Assessment of the deficiency has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiency.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court

in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosures:

Statement

[fol. 282] STATEMENT

Code 411:90D:TC

Mrs. Axie Blue
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Year Ended
December 31, 1960

Summary of Deficiency

	Deficiency
Income tax	$5,246.81

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments April 9, 1963 for the taxable year ended December 31, 1960

	Deficiency	*Interest to 4-9-63*
Income tax	$12,569.66	$1,497.17

It has been found necessary in this determination to make adjustment in the assessment made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessment will be

abated to the extent that it exceeds the deficiency set forth herein. The adjustment is as follows:

Year	*Assessment in excess of liability Income tax*
1960	$7,322.85

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

[fol. 283] ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$11,507.87
Additional income and unallowable deductions:		
(a) Income from dividends	$6,571.70	
(b) Capital gains	4,265.01	
(c) Other deductions	600.00	11,436.71
Taxable income adjusted		$22,944.58

EXPLANATION OF AJUSTMENTS

(a) It is determined that you received dividend distributions which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $6,571.70, computed as follows:

Total unreported Dividend distributions	$13,143.40
Your one-half share	6,571.70

(b) It is determined that you received distributions taxable as long-term capital gains from the sale or exchange of property which you failed to report in your return. Accordingly, the taxable income reflected in your separate

return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $4,265.01, computed as follows:

Total long-term capital gain distributions received	$15,077.89
Total long-term capital gains reflected in your return	—0—
Total corrected net-long-term capital gains	$15,077.89
Less: Total net short-term capital loss reflected in your return	2,017.84
Balance	$13,060.05
Your one-half share	$ 6,530.03
Less: Deduction for capital gains (50% of $6,530.03)	3,265.02
Corrected capital gains	$ 3,265.01
Add: Capital loss deducted in return	1,000.00
Increase in taxable income	$ 4,265.01

[fol. 284] (c) The deduction reflected in your separate return in the total amount of $1,200.00 for use of separate office in home which is claimed as an other deduction is disallowed because it has not been established that the amount constitutes an ordinary and necessary business expense or was expended for the purpose designated. Therefore, your taxable income is increased $600.00, the community share deducted in your return.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

	Tax at Ordinary Rates	*Alternative Tax*
Taxable income adjusted	$22,944.58	$22,944.58
Less: Excess of net long-term capital gain over net short-term capital loss		3,265.01
Ordinary taxable income		$19,679.57
Tentative tax	$ 8,937.30	$ 7,090.17
Plus: 50% of $3,265.01	—0—	1,632.50
Total	$ 8,937.30	$ 8,722.67
Less: Dividends received credit (4% of $6,656.70)		266.27
Correct income tax liability—alternative tax (lesser amount)		$ 8,456.40
Income tax liability shown on return, account No. BF 2968		3,209.59
Deficiency of income tax		$ 5,246.81

[fol. 285] DEFENDANT'S EXHIBIT F

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3613-63

BEN BLUE, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of

Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Ben Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties is for the calendar year 1960 in the following amount:

[fol. 286]

	Deficiency	*Penalty Sec. 6653(b)*
Income Tax	$5,339.75	$2,669.88

The entire deficiency and all of the penalties are in dispute.

4. The determination of deficiency and penalties set forth in said deficiency notice are based upon the following errors:

1960

a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which he did not report on his return for the year 1960.

b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.

c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.

d. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1960 was due to fraud with the intent to evade tax.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

a. Petitioner received no dividened distributions which he failed to report on his return.

b. Petitioner received no distributions taxable as long term capital gains which he failed to report on his return.

c. Expenses deducted for the use of a separate office in Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

[fol. 287] d. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioner.

/s/ ERNEST R. MORTENSON
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 288] VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss.

BEN BLUE, being duly sworn, deposes and says:

That he is the Petitioner above-named;

That he has read the foregoing Petition and is familiar with the statements contained therein, and

That the statements contained therein are true, except those stated to be upon information and belief, and that these he believes are true.

/s/ BEN BLUE
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays
Notary Public in and for said
County and State

[fol. 289] EXHIBIT A

SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Taxable Year Ended	*Deficiency*	*Code Section 6653(b) Penalty*
December 31, 1960	$5,339.75	$2,669.88

Dear Mr. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the taxable year ended December 31, 1960 discloses a deficiency in tax and penalty in the amounts shown above. Assessment of the deficiency has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiency.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanction provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 290] STATEMENT

Code 411:90D:TC

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Year Ended

December 31, 1960

Summary of Deficiencies

	Deficiencies	*Penalty Sec. 6653(b)*
Income tax	$5,339.75	$2,669.88

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments April 9, 1963 for the taxable year ended December 31, 1960

	Deficiency	*Penalty*	*Interest to 4-9-63*
Income tax	$12,726.19	$6,363.10	$1,515.81

[fol. 291] It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

	Assessment in excess of liability	
Year	*Income tax*	*Penalty*
1960	$7,386.44	$3,693.22

It is determined that all or part of the underpayment of tax required to be shown on the return for the taxable year ended December 31, 1960 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted.

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$12,107.86
Additional income and unallowable deductions:		
(a) Income from dividends	$6,571.70	
(b) Capital gains	4,265.01	
(c) Other deductions	600.00	11,436.71
Taxable income adjusted		$23,544.57

[fol. 292] EXPLANATION OF ADJUSTMENTS

(a) It is determined that you received dividend distributions which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income

and deductions computed on a community basis, is increased in the amount of $6,571.70, computed as follows:

Total unreported Dividend distributions	$13,143.40
Your one-half share	6,571.70

(b) It is determined that you received distributions taxable as long-term caiptal gains from the sale or exchange of property which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $4,265.01, computed as follows:

Total long-term capital gain distributions received	$15,077.89
Total long-term capital gains reflected in your return	—0—
Total corrected net-long-term capital gains	$15,077.89
Less: Total net short-term capital loss reflected in your return	2,017.84
Balance	$13,060.05
Your one-half share	$ 6,530.02
Less: Deduction for capital gains (50% of $6,530.02)	3,265.01
Corrected capital gains	$ 3,265.01
Add: Capital loss deducted in return	1,000.00
Increase in taxable income	$ 4,265.01

[fol. 293] (c) The deduction reflected in your separate return in the total amount of $1,200.00 for use of separate office in home which is claimed as another deduction is disallowed because it has not been established that the amount constitutes an ordinary and necessary business expense or was expended for the purpose designated. Therefore, your taxable income is increased $600.00, the community share deducted in your return.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

	Tax at Ordinary Rates	*Alternative Tax*
Taxable income adjusted	$23,544.57	$23,544.57
Less: Excess of net long-term capital gain over net short-term capital loss		3,265.01
Ordinary taxable income		$20,279.56
Tentative tax	$ 9,291.24	$ 7,416.50
Plus: 50% of $3,265.01	—0—	1,632.50
Total	$ 9,291.24	$ 9,049.00
Less: Dividends received credit (4% of $6,656.70)		266.27
Correct income tax liability— alternative tax (lesser amount)		$ 8,782.73
Income tax liability shown on return, account No. BF 2969		3,442.98
Deficiency of income tax		$ 5,339.75
Section 6653(b) penalty 50% of $5,339.75		$ 2,669.88

[fol. 294]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

BEN BLUE, Appellee.

NOTICE OF MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT OF THE UNITED STATES—

Filed May 26, 1965

PLEASE TAKE NOTICE that on July 6, 1965, at 9:30 A.M., or as soon thereafter as counsel may be heard, in

the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the 16th floor of the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, the appellee will move said Court for entry of an order certifying the case to the Supreme Court of the United States.

The ground for said motion will be that the appeal herein from a judgment sustaining a special plea in bar in a criminal case should have been taken directly to the Supreme Court.

Said motion will be based upon this notice, the attached motion, the points and authorities in support thereof [fol. 295] and the records and papers on file herein.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

[fol. 296]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT OF THE UNITED STATES—Filed May 26, 1965

The United States moves this Court to certify the above-entitled case to the Supreme Court of the United States, pursuant to the Criminal Appeals Act, as amended (18 U.S.C. 3731), on the ground that the appeal herein from

a judgment sustaining a special plea in bar in a criminal case should have been taken directly to the Supreme Court.

Respectfully submitted,
MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Divsion
/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

* * * * * * *

[fol. 297] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

OPPOSITION TO MOTION TO CERTIFY CAUSE TO THE SUPREME COURT OF THE UNITED STATES—

Filed June 12, 1965

The Appellee, Ben Blue, respectfully opposes the Motion of the United States to certify the above-entitled case to the Supreme Court of the United States pursuant to the Criminal Appeals Act, as amended (18 U.S.C. §3731) on the ground that the appeal herein was an appeal by the United States from a dismissal in the interests of justice and under the provisions of Rule 48(b) of the Federal Rules of Criminal Procedure and was not a judgment sustaining a special plea in bar, and that said dismissal does not come within any of the provisions of the said Criminal Appeals Act so that neither this Honorable Court

or the Supreme Court of the United States has jurisdiction of this appeal.

Dated: 9th day of June, 1965.

Respectfully submitted,

Mortenson & Maxwell
By: Ernest R. Mortenson
Counsel for Appellee

* * * * * * *

[fol. 298]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO DISMISS APPEAL—Dated June 9, 1965

Appellee, Ben Blue, moves the Court to dismiss the appeal herein with costs to appellee on the grounds that:

1. The Notice of Appeal is insufficient and is not effective to give this Court jurisdiction of this appeal.

2. That the subject matter of this appeal is not within the jurisdiction of this Court or that of the Supreme Court of the United States.

Respectfully submitted,

Mortenson & Maxwell
By: Ernest R. Mortenson
Counsel for Appellee

[fol. 299]

QUESTIONS PRESENTED ON MOTION TO DISMISS APPEAL

The questions presented on Motion to Dismiss Appeal are as follows:

1. Where the United States fails to designate the Court to which appeal is taken in a Notice of Appeal from an

adverse decision in a criminal case under the provisions of 18 USC §3731, providing for appeal by the United States in specific instances to the Circuit Court of Appeals and in other specific instances to the Supreme Court of the United States, does the Court of Appeals have jurisdiction of the appeal?

2. Is the dismissal of a tax evasion indictment by the District Court the proper subject of appea' within the terms of 18 USC §3731 where: (a) the Government has determined to institute criminal proceedings against the appellee; (b) then later levies a jeopardy assessment against him; seizes all his property and files liens of record; (c) thus forcing him in defense of his property to file verified factual petitions in the Tax Court; (d) which petitions are considered as an integral part of the Government's criminal case file; (e) whereupon he is subsequently indicted for income tax evasion and; (f) the Government has not made provisions for the release of lien on monies for use in his defense?

• • • • • • •

[fol. 300] STATEMENT OF FACTS

Many of the facts hereinafter related are taken from the facts stated in Appellee's Motion to Dismiss in the Court below, (R. 73) as admitted or qualified in the Opposition to Motion filed by the United States (R. 125) and as further admitted or qualified in Appellee's Reply to Opposition (R. 153). References will be made to pages of the Motion, Opposition and Reply. All transcript references are to transcript of the hearing on the Motion to Dismiss on February 8, 1965.

An August 6, 1964, Ben Blue, Appellee, was indicted for evasion of the income taxes of himself and his wife for the years 1958 and 1959 and of himself for the year 1960 under the provisions of §7201 of the Internal Revenue Code (26 USC §7201) and for knowingly making and subscribing false corporation income tax returns for Merry-Go-Round, Inc., a California corporation, of which he was

the sole stockholder, for the years 1958 to 1960, inclusive. (R. 2)

On November 2, 1962, one and one-half years prior to the indictment, he was advised in writing by Robert K. Lund, Chief of the Intelligence Division of the Internal Revenue Service at Los Angeles, California, to the effect that investigation had been made of the income tax liabilities of the Appellee and Merry-Go-Round, Inc., and [fol. 301] that consideration was being given to the institution of criminal proceedings. Appellee was offered a conference "before final decision is made." (Affidavit in support of Motion to Dismiss, p. 2; letter attached to Opposition to Motion, R. 150 and included as Appendix I hereto.)

At the conference held in November of 1962, Ernest R. Mortenson, attorney for the Appellee, was advised that the District Director would recommend prosecution of Ben Blue on criminal tax charges. A later conference was held with the Regional Office of the Internal Revenue Service at San Francisco, California on March 8, 1963 with similar results. (Affidavit in Support of Motion, p. 3.)

On April 9, 1963, without notice to the Appellee, the United States made a "jeopardy" assessment against the Appellee, his wife, and Merry-Go-Round, Inc. for deficiencies in their income taxes and in the excise tax of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive, in the total amount of $272,276.63, including taxes, penalties and interest to April 9, 1963. (Motion, p. 2.)

In April 1963, the United States also filed income tax liens of public record in accordance with said assessments and levied upon and seized various bank accounts, accounts receivable and brokerage accounts owned by Appellee, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc., [fol. 302] another wholly owned corporation of Appellee. (Motion, pp. 2-4.)

The record discloses no reason for the assertion of the jeopardy assessment by the Government. The statute of limitations had been extended until June 30, 1964 on the tax liabilities involved. (R. Ex.G; Motion, p. 2.)

The Collection Officer who levied on Appellee's properties and filed the tax liens, testified that he did not investigate to determine the extent of Appellee's assets, but was furnished with this information by Special Agent Charles Freeman, who had recommended criminal prosecution for the Internal Revenue Service. The Collection Officer testified that his action was directed by the Intelligence Division of the Internal Revenue Service. (TR. 79.)

On June 6, 1963, the United States issued statutory notices of deficiencies against Appellee, his wife and Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive for income taxes and penalties in the total amount of $17,521.93, exclusive of interest. Said notices stated that the assessments of April 9, 1963 were erroneous and would be abated to the extent that they exceeded the deficiencies set forth in the notices. Each notice contained the following statement: "If you elect to contest this determination in the Tax Court of the United States, a petition [fol. 303] must be filed within ninety days from the date of this letter with that Court in accordance with its Rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C." (Motion, p. 4.)

Since Appellee was unable to pay the tax (TR. 149) he filed verified petitions to the Tax Court of the United States which stated the facts upon which Appellee relied in contesting the deficiencies as is required by Rule 7 of the Tax Court Rules of Practice. The petitions were filed on July 29, 1963 and are Exhibits B through F on the Motion to Dismiss. Copies of these petitions were included, considered and used as a part of the criminal case file by the Internal Revenue Service and the Department of Justice and are contained in the United States Attorney's file. (TR. 67-68.)

Robert K. Lund, Chief of the Intelligence Division of the Internal Revenue Service at Los Angeles, California, testified that civil liabilities generally are not assessed until after the criminal phases of a tax case have been disposed of. He could not recall any other case in the last year where a jeopardy assessment had been levied after a criminal investigation was started. (TR. 89.)

Appellee requested the United States to cause funds to be released from those held under the levies so that Appellee might have funds to pay his counsel and other expenses of the criminal litigation, but this was denied. (TR. 97-98.)

[fol. 304] On November 24, 1964, Appellee moved to dismiss the indictment. (R. 73.) The Motion was on the grounds that Appellee could not have a fair trial, that he had been deprived of due process of law, had been denied the right to employ counsel of his choice and had been compelled to testify against himself in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, by virtue of the fact that the above punitive civil action had been taken against the Appellee forcing him, among other things, to make statements of fact before the Tax Court of the United States in defense of his property after the United States had determined to institute criminal prosecution against Appellee but long before it did so by way of indictment.

On February 8, 1965, after hearing on the Motion, the District Court Judge dismissed the indictment against the Appellee on the following ground:

> "I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has con-[fol. 305] cerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.
>
> "The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one

Government, and all of the agencies work for one United States of America.

"I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the Court should dismiss the Indictment, and I will dismiss it on that ground alone."

In making his decision, the District Court Judge made it clear that there was no question of constitutionality in his decision.

"Mr. Schulman: Is Your Honor discussing the constitutionality in deciding this?

[fol. 306] The Court: No.

Mr. Schulman: You are not saying what rights of the defendant have been violated here.

The Court: Yes, I am.

Mr. Schulman: This is what confuses me.

The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case."

* * * * * * *

[fol. 307] APPENDIX I

Letter to Appellee advising of possible criminal proceedings dated November 1, 1962.

[fol. 308] Intelligence Division

P.O. Box 2151

Los Angeles 53, California

November 1, 1962

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Dear Mr. Blue:

The current investigation by the Intelligence Division of your income tax liability for the years 1958 to 1960, inclusive, and of the tax liability of Merry-Go-Round, Inc., for the years 1958 through 1960, is nearing completion. developments of the investigation indicate that a substantial amount of your income and part of the income of Merry-Go-Round, Inc., is not reflected on your Federal income tax returns and the corporation's income tax returns. Consideration is being given to a possible recommendation that criminal proceedings be instituted against you for attempted evasion of your income taxes and the income taxes of Merry-Go-Round, Inc.

In the circumstances, it is deemed appropriate to grant you a formal interview, before final decision is made, at which time you may appear with counsel if you so desire or with any other person who may have knowledge of the facts in your case whom you wish to be present.

Accordingly a formal interview has been set in this matter to be held at 10:00 a.m. on November 13, 1962, in Room 1726, U.S. Post Office and Court House, 312 North Spring Street, Los Angeles, California. Mr. Daniel J. Breslin, Group Supervisor, will conduct the interview. You may at that time present any facts or evidence which you wish to have considered in connection with this matter.

You are requested to inform this office promptly whether you intend to appear for the proposed formal interview. It is important that your reply, and any inquiries relating thereto be addressed to District Director of Internal Revenue, Attention: Chief, Intelligence Division, P.O. Box 2151, Los Angeles 53, California.

Very truly yours,
Robert K. Lund
Chief, Intelligence Division

[fol. 309] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

NOTICE OF MOTION TO DISMISS APPEAL—Filed June 21, 1965

PLEASE TAKE NOTICE that on July 6, 1965 at 9:30 A.M. or as soon thereafter as counsel may be heard, in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the 16th floor of the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, the appellant will move said Court for entry of an order dismissing the appeal herein.

The grounds for said motion will be that the Notice of Appeal is insufficient and is not effective to give this Court jurisdiction of this appeal and the subject matter of this appeal is not within the jurisdiction of this Court or that of the Supreme Court of the United States.

[fol. 310] Said motion will be based upon this notice, the Motion to Dismiss Appeal heretofore filed, together with attachments thereto and the records and papers on file herein.

Respectfully submitted,

Mortenson & Maxwell
By: Clyde R. Maxwell
Counsel for Appellee

Dated: 18th day of June, 1965

[fol. 310a] Affidavit of service by mail [omitted in printing]

• • • • • • • •

[fol. 312]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL—
Filed July 3, 1965

Appellant, United States of America, opposes appellee's Motion to Dismiss the Appeal herein for the following reasons:

1. The Notice of Appeal was sufficient to give this Court jurisdiction of this appeal.

2. The appeal herein although originally docketed in this Court, should have been taken directly to the Supreme Court of the United States, as an appeal from a judgment sustaining a special plea in bar in a criminal case; and appellant accordingly has properly moved this Court to certify the above-entitled case to the Supreme Court, pursuant to the Criminal Appeals Act, as amended, Title 18, United States Code, Section 3731.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

[fol. 313]

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

• • • • • • • •

[fol. 314]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,007

Appeal from the United States District Court for the Southern District of California, Central Division.

UNITED STATES OF AMERICA, Appellant,

vs.

BEN BLUE, Appellee.

Before: Jertberg, Circuit Judge, Madden, Judge Court of Claims, and Duniway, Circuit Judge.

OPINION—August 16, 1965

DUNIWAY, *Circuit Judge:*

The United States moves that we certify this appeal to the Supreme Court of the United States, pursuant to the provisions of the Criminal Appeals Act, as amended, 18 U.S.C. §3731. The appellee, Ben Blue, opposes the motion and moves that we dismiss the appeal. We deny Blue's motion and grant the government's motion.

1. *The factual background.*

On August 5, 1964 Blue was indicted on 6 counts. The first 3 counts charge the filing of false and fraudulent income tax returns for the calendar years 1958, 1959 and 1960 (26 U.S.C. §7201). The other 3 counts charge the filing of false income tax returns on behalf of a corporation, Merry-Go-Round, Inc., for the same three calendar years. (26 U.S.C. §7206(1)). On November 24, 1964 Blue filed

a motion to dismiss the indictment. The grounds are: In the course of an investigation of the income tax returns [fol. 315] of Blue and of the corporation for the years in question, and as early as November 13, 1962, Blue and his counsel were advised that the Internal Revenue Service proposed to recommend criminal prosecution of Blue in connection with the tax returns for the years in question. On April 12, 1963 the Service levied a jeopardy assessment against Blue and served him with a so-called 90-day letter, stating the assessment, the claimed deficiencies, and his right to petition the Tax Court for relief. Levies were made on all of his known assets, but these did not produce enough funds to pay the assessments. Within the 90 days, and on July 29, 1963, Blue did file petitions for relief with the Tax Court. These petitions were transmitted to the Enforcement Division of the Internal Revenue Service on October 17, 1963 and from there found their way to the Department of Justice and ultimately into the files of the Assistant United States Attorney handling the prosecution.

2. *The trial court's ruling.*

Blue's motion to dismiss the indictment was based upon two principal contentions: (1) that the levying of the jeopardy assessment deprived him of access to all of his assets and thereby prevented him from being adequately represented by counsel and from procuring the services of an accountant in the defense of the criminal charge, and (2) that by tying up all of his assets, the government prevented him from paying the taxes assessed and suing for a refund and, in effect, compelled him to file petitions with the Tax Court in which, in order to present his case to the Tax Court, he was forced to disclose information in violation of his privilege, under the Fifth Amendment to the Constitution, against incriminating himself. The motion is supported by an affidavit of his counsel, and at the hearing various witnesses testified.

At the conclusion of the hearing the court granted the motion but wrote no opinion, the only order in the record being a minute order which reads in pertinent part: " . . .

indictment dismissed; defendant discharged; bond exonerated." It found against Blue's first contention, but sustained his second contention.[1]

[fol. 316]

3. *The sufficiency of the notice of appeal.*

One ground upon which Blue asks us to dismiss the government's appeal is that the notice of appeal does not state [fol. 317] the name of any court to which the appeal is taken. The notice does, however, contain all of the material that is required by Rule 37 of the Federal Rules of Criminal Procedure. On the other hand, it does not conform to Rule 10 of the Rules of the Supreme Court, which relate to appeals to that Court. Apparently, counsel who prepared the notice read Rule 37, but did not look at the accompanying Form 26, which contains a recital that the appellant appeals "to the United States Court of Appeals for the ..... Circuit." In fact, on the day the notice of appeal was filed, the Clerk of the District Court forwarded a copy of the notice of appeal and a statement of the docket en-

[1] At the conclusion of the hearing, the court first stated that it could not sustain the first contention, because Blue had earnings and earning capacity and so was able to employ counsel and other assistants. It then made the following remarks, among others:

"I am much bothered, however, by the fact that the Jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

"The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice, and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

"I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

"Mr. Schulman [government counsel]: May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to, nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the'

tries to the Clerk of this court, as is required by Rule 37 (a)(1), and mailed a copy to counsel for Blue, as is also provided in the rule. We think that the failure of the notice to name the court to which the appeal is taken is immaterial, since the appeal normally will come to this court, as the rule itself indicates, and the regular procedure was in fact followed. Our view is strengthened by the fact that the Criminal Appeals Act provides for a transfer of an [fol. 318] appeal to the proper court if the appellant should appeal to the wrong court. This, rather than dismissal, is the remedy calculated to assure a just disposition of the case. This is precisely the sort of technical objection that the Rules were designed to eliminate. (Rule 2.) We therefore hold that this ground for dismissal is without merit.

4. *The motion that we certify the appeal to the Supreme Court.*

The Criminal Appeals Act lists three sets of circumstances under which an appeal may be taken by the United

---

Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.
"The Court: I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.
"Mr. Schulman: Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't know if that evidence would be offered or the Government has now said that it is telling the court it would not offer such evidence, and without the admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?
"The Court: I think so, counsel . . . I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel."

* * * * * * *

"Mr. Schulman: Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——
"The Court: And followed by an Indictment.

States direct to the Supreme Court. The third and the only one which could be applicable here reads as follows:

> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The government contends that what the court did here was, in essence, to sustain a motion in bar. It is conceded that Blue has not yet been put in jeopardy.

[fol. 319] In the first case construing the statute, *United States* v. *Celestine*, 1909, 215 U.S. 278, the Court held, without elaboration, that the sustaining of a plea which challenged the jurisdiction of the Federal Court over an Indian, was the sustaining of a special plea in bar. This was followed by *United States* v. *Barber*, 1911, 219 U.S. 72. In that case the trial court sustained what was denominated a plea in abatement, the basis of which was that the prose-

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"Mr. Schulman:——and followed by an Indictment.——
"The Court: Yes.
"Mr. Schulman: ——then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.
"The Court: That is right."
* * * * * * *

"Mr. Schulman: Is your Honor discussing the constitutionality in deciding this?
"The Court: No.
"Mr. Schulman: You are not saying what rights of the defendant have been violated here."
* * * * * * *

"Mr. Schulman: This is what confuses me.
"The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case.
"Mr. Schulman: Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?
"Mr. Mortenson [Counsel for Blue]: With what?
"Mr. Schulman: That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.
"Mr. Maxwell [Co-counsel for Blue]: They have levied on all his assets, your Honor. That wasn't enough to pay the tax.
"The Court: I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient money to pay the tax, and I will draw that inference."

cution was barred by the statute of limitations when the indictment was found. The Court held that the substance of the action of the Court, and not the label that attached to it, should determine whether the Court's action was the sustaining of a plea in bar. It then laid down the following rule:

> "As said by counsel for the Government, 'the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both civil and criminal procedure, as a plea in bar and not one in abatement.' " (p. 78.)

This decision was followed in *United States* v. *Oppenheimer*, 1916, 242 U.S. 85 and in *United States* v. *Goldman*, 1928, 277 U.S. 229.

In *United States* v *Thompson*, 1920, 251 U.S. 407, the trial court quashed an indictment on the ground that when a prior Grand Jury had had the case presented to it and refused to indict, the United States Attorney could not then take the matter again to a second Grand Jury and obtain an indictment. The Court held that this amounted to the sustaining of a plea in bar "because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment, but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based." (p. 412.)

In *United States* v. *Storrs*, 1926, 272 U.S. 652, the defendants, indicted for a conspiracy to use the mails to defraud, pleaded in abatement certain irregularities in the proceedings of the Grand Jury, and the Court dismissed [fol. 320] the indictment. The irregularities had nothing to do with the merits—with the right of the government to prosecute. They could readily be avoided in obtaining a new indictment. At the time of the dismissal the statute

of limitations had run. The Court held that the fact that the statue of limitations had run after the indictment was found did not convert the plea in abatement into a plea in bar, and that the plea in abatement did not amount to a plea in bar because it did not look to barring the action, but only to abating it. In the course of his opinion, Mr. Justice Holmes used the following language: "The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense." *United States* v. *Thompson, supra* was distinguished and was said to go "to the extreme point."

The next decision is *United States* v. *Murdock*, 1931, 284 U.S. 141. Murdock was indicted for refusing to answer questions put to him by an Internal Revenue Agent acting under a summons that had been served upon Murdock. He entered a plea to the indictment, the basis for which was that if he had answered the questions he would have been compelled to become a witness against himself in violation of the Fifth Amendment. The Court sustained the plea and discharged him. The Court said that the effect of the order was "to bar further prosecution for the offense charged," (p. 147) and that consequently, it amounted to a plea in bar. It cited all of the foregoing cases except *Celestine*. In *United States* v. *Hark*, 1944, 320 U.S. 531, Hark was indicted for violating a maximum price regulation issued under the Emergency Price Control Act of 1942 (56 Stat. 23). The Court granted a motion to quash on the ground that, because the regulation had been repealed subsequent to the offense charged, the defendant could not be prosecuted. This was held to be a bar to the prosecution, and therefore, in substance, a plea in bar, citing *Thompson*, *Barber* and *Oppenheimer*, *supra*.

United States v. *Hoffman*, 1948, 335 U.S. 77, involved criminal contempt proceedings against Hoffman based upon a charge that he had violated an injunction prohibiting him from selling used cars at over ceiling prices, in violation of the Emergency Price Control Act. A rule to show cause was dismissed on his motion on the ground that he was entitled to immunity under Section

202(g) of the Act. The jurisdiction of the Supreme Court [fol. 321] was sustained under the Criminal Appeals Act, but no party seems to have contended that the order of the Court did not amount to the sustaining of a plea in bar, the only question being whether the United States, as distinguished from the Administrator of the Office of Price Administration, was the plaintiff in the injunction case, and so could appeal.

Finally, there is the decision in *United States* v. *Mersky*, 1960, 361 U.S. 431. In that case, one of the questions involved was the construction of certain regulations issued by the Secretary of the Treasury under 19 U.S.C. §1304. A majority of the Court held that a dismissal of the information, based upon the determination of the court below that the acts charged did not violate the regulation, was a decision dismissing the information based upon the invalidity or construction of the statute upon which the indictment or information is founded, this being another ground for direct appeal to the Supreme Court under Section 3731 of Title 18. The majority therefore expressly declined to reach the question whether the action of the trial court also amounted to the sustaining of a motion in bar. Mr. Justice Brennan, with whom Mr. Justice Whittaker agreed, was of the opinion that the Court had sustained a plea in bar because the judgment was one "which will end the cause and exculpate the defendant." He relied upon *Hark, Murdock and Storrs, supra.* Mr. Justice Frankfurter and Mr. Justice Stewart, with whom Mr. Justice Harlan concurred, were of the opinion that the Court's decision did not amount to a sustaining of a plea in bar. Mr. Justice Frankfurter relied upon the *Storrs* case, *supra*, feeling that *Hark, supra*, was wrongly decided. Mr. Justice Stewart was of the same opinion, and at page 457 of his dissent, he states the technical history of the concept of a special plea in bar as one which sets up affirmative defenses which would bar the prosecution and he points out that each of the decisions that we have cited above involves action of this character.

This court, in *United States* v. *Apex Distributing Company*, 9 Cir., 1959, 270 F.2d 747, held that the mere fact

that an order purports to dismiss a criminal proceeding "with prejudice' does not make it the sustaining of a plea in bar, and that the dismissal of an indictment for failure by the government to obey a pretrial order for the produc-
[fol. 322] tion of documents was not the sustaining of a plea in bar. The ground for dismissal in Apex could have been cured by compliance with the pretrial order. Thus the plea was clearly not a plea in bar within the meaning of the statute. In accord is *United States* v. *Heath*, 9 Cir., 1958, 260 F2d. 623 at 629, *ff*. There we laid down the rule that "a motion in bar destroys the right of action and bars prosecution." The motion there was similar to that in *Apex*. The government had lost certain papers of the defendant, necessary to his defense. If the government should find them, it could then proceed. Thus the granting of the motion did not destroy the right of action or bar the prosecution.

At first blush, *United States* v. *Brodson*, 7 Cir., 1956, 234 F.2d 97 seems squarely in point. There the trial court sustained a motion almost identical to the one here. However, the self-incrimination question was not raised. The court granted the motion on the ground that the jeopardy assessment prevented the defendant from preparing his defense, by depriving him of funds with which to do so. This ground could have been avoided by the government by cancelling the assessment, or by releasing sufficient funds to enable the defendant to defend himself. The Court of Appeals held that this was merely an abatement of the action, not the sustaining of a plea in bar and declined to certify the appeal to the Supreme Court. It cited *Goldman* and *Murdock*, *supra*, and it specifically distinguished *Murdock* as being a decision involving a dismissal based on the constitutional guarantee against self-incrimination. We do not think that *Brodson* is in point. Here, the trial court specifically rejected the ground upon which the trial court in *Brodson* granted the motion. Here, the court's order was specifically based (see *footnote 1*, *supra*) on a violation of the Fifth Amendment privilege against self-incrimination.

It is arguable that in this case what the court did was to sustain a plea in abatement because the ground for the motion "has nothing to do with the merits of the criminal action" (*Apex, supra*, 270 F.2d 750), but rather arises from an event occurring independently of the finding of the indictment, namely, the filing of the petitions with the Tax Court under compulsion of the jeopardy assessments. On the other hand, the basic facts upon which the order is grounded—the levying of the assessment, and the filing of the petitions in the Tax Court, under the compulsion [fol. 323] of the assessment—occurred before the indictment was found. Thus, if the theory on which the motion was granted is sound, the indictment was subject to the fatal weakness with which the trial court thought it was infected at the time when the case was in the womb of the Grand Jury, and it carried the taint when it was born. There is no way, as there was in *Apex,* or *Heath* or *Brodson* or *Storrs,* in which it could be cured. Does not the order, then amount to a sustaining of a plea in bar? Does it not "bar the absolute right of the United States to prosecute" *(Thompson, supra)* or "bar further prosecution of the offense charged" *(Murdock, supra)?* We think that it does, and that the motion to certify the appeal to the Supreme Court should be granted. If the trial court's views are correct, there is no possible way in which the defect in the indictment can be cured, in this case or in any other indictment that may be found. The decision thus amounts to an acquittal of Blue. It makes no difference whether the decision was correct. That is what the appeal is about.

Under the Criminal Appeals Act, an appeal does not lie to this court in a case "where a direct appeal to the Supreme Court of the United States is provided by this section." (18 U.S.C. §3731.) We need not, therefore, consider whether, if not appealable to the Supreme Court, the decision could be appealed to this court.

The motion to dismiss the appeal is denied. The motion to certify the appeal to the Supreme Court is granted.

[fol. 324] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

ORDER denying petition for rehearing and petition for rehearing en banc—September 15, 1965.

Before: Jertberg, Circuit Judge, Madden, Judge, Court of Claims, and Duniway, Circuit Judge.

Appellees petition for rehearing is denied. Appellee's petition for rehearing en banc is denied.

GILBERT H. JERTBERG
United States Circuit Judge

/s/ J. WARREN MADDEN
J. Warren Madden
Judge, Court of Claims

BEN C. DUNIWAY
United States Circuit Judge

[fol. 325]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

Certificate of Clerk, United States Court of Appeals for the Ninth Circuit, to record certified to the Supreme Court of the United States.

I, FRANK H. SCHMID, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing transcript of record in three volumes to be the full, true and entire record, excluding original exhibits,

filed in my office in the above cause, together with the proceedings had in this Court, made pursuant to the order of the said United States Court of Appeals for the Ninth Circuit, and certified under the Criminal Appeals Act, 18 U.S.C. Sec. 3731.

ATTEST my hand and the seal of the said United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of August, 1965.

/s/ Frank H. Schmid
Frank H. Schmid, Clerk

[fol. 326]

Supreme Court of the United States

No. 531, October Term, 1965

United States, Appellant,

vs.

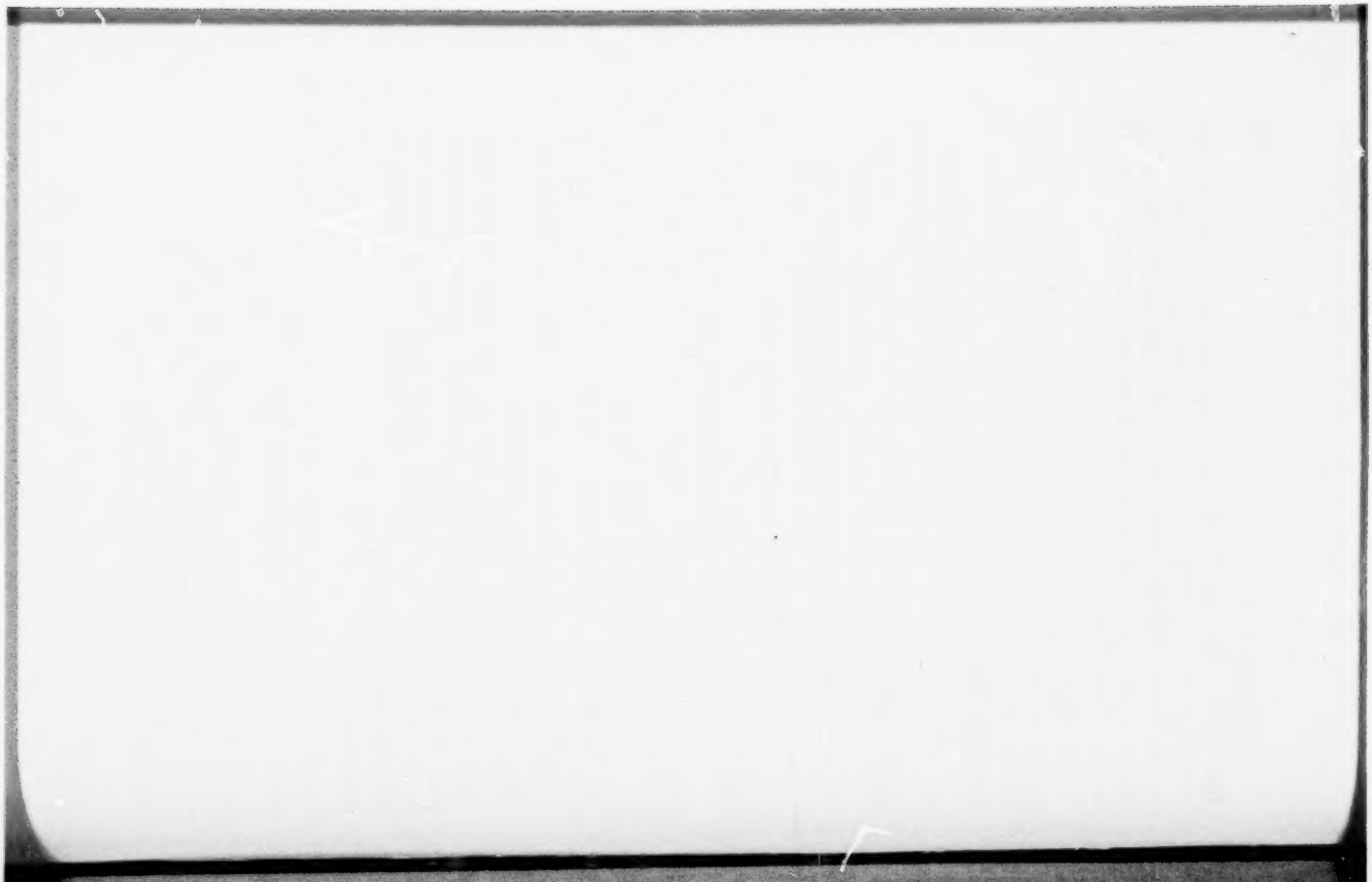
Ben Blue

Order Postponing Jurisdiction—January 17, 1966

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits and is placed on the summary calendar.

January 17, 1966



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IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

Motion to Dismiss Appeal or Affirm Decision of the United States District Court for the Southern District of California.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

Motion to Dismiss Appeal or Affirm Decision of the United States District Court for the Southern District of California.

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the District Court on the grounds that this Court does not have jurisdiction and that it is clear that the questions on which the decision depends are unsubstantial and do not need further argument.

Opinion Below.

The Opinion of the Court of Appeals for the Ninth Circuit No. 20,007, Aug. 16, 1965 is reported in P-H 1965, par. 65,5175.. The District Court did not write an opinion.

Questions Presented.

1. DOES THE UNITED STATES HAVE AN APPEAL TO THIS COURT UNDER 18 U.S.C. 3731 WHERE THE DISTRICT COURT HAS DISMISSED AN INDICTMENT, WHICH JUDGMENT IS NOT BASED ON THE INVALIDITY OR CONSTRUCTION OF A STATUTE BUT ON THE GROUND THAT THE DEFENDANT, UNDER THE CIRCUMSTANCES, COULD NOT HAVE A FAIR TRIAL?

2. IS THE DECISION OF THE DISTRICT COURT ONE "SUSTAINING A MOTION IN BAR", THE DEFENDANT NOT HAVING BEEN PUT IN JEOPARDY?

3. SHOULD THE JUDGMENT OF THE DISTRICT COURT BE AFFIRMED ON THE GROUND THAT THE QUESTION IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT?

Statement.

On Motion of defendant Ben Blue, the District Court dismissed a six count indictment against Blue (for tax offenses) on the principal ground that the defendant could not have a fair trial.

Defendant Blue was indicted on August 6, 1964. One and one-half years prior to this, November 2, 1962, Blue had been advised by the local Chief of the Intelligence Division that consideration was being given to the institution of criminal procedure. On April 9, 1963 a jeopardy assessment was made against Blue and Merry-Go-Round, Inc., his wholly owned corporation,

for deficiencies in income and excise taxes in the total amount of $272,276.63.

The District Court found that Blue was unable to pay the taxes and accordingly determined that he was compelled under the provisions of the Internal Revenue Code to file a *verified* petition in the Tax Court of the United States in order to protect his property.

At the time of the indictment, therefore, Blue had previously been compelled to file a verified statement of facts regarding tax on the same income for the same years involved in the indictment.

At the time of the dismsisal of the indictment the following colloquy occurred, "Mr. Schulman: Is your Honor discussing the constitutionality in deciding this? The Court: No." [R. T. pp. 148, 149.] The Court also stated:

> "I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself." [R. T. p. 144.]

On appeal of the dismissal by the Government the Ninth Circuit certified the appeal to this Court. The Government has not filed a statement of jurisdiction.

The only ground on which this Court would appear to have jurisdiction, since there is no constitutional question involved, is that it is a direct appeal under §3731 of Title 18 "from the decision or judgment sustaining a Motion in Bar," Blue not having been put in jeopardy. As will be more fully discussed later, the dismissal of the indictment herein was in the interests of justice (analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure) and not as a result of a motion in bar. This is clearly not a situation in which there was former acquittal, former conviction or pardon which traditionally were the grounds for a plea in bar.

It should be noted that the Government's notice of appeal herein is captioned "Appellant, United States of America hereby appeals from the said order of February 8, 1965 dismissing the indictment herein." [R. T. p. 164.] Form 26 of the Federal Rules of Criminal Procedure requires that the appellant name the Court to which the appeal is taken. The Notice of Appeal in this respect is therefore defective.

The District Judge specifically mentioned that he relied on *Boyd v. United States,* 116 U.S. 616 and *United States v. Heath,* 260 F. 2d 623 (CA-9, 1958) and that he considered "the circumstances peculiar to this case," in dismissing the indictment. [R. T. p. 144, line 22.] The record is bare of any evidence supporting the reason for making a jeopardy assessment and the Chief, Intelligence Division, Internal Revenue Service, Los Angeles District, testified as follows:

> "A. Civil liabilities generally are not assessed until after the criminal phases of the case have been disposed of." [R. T. p. 85.]

He further testified:

"Q. Do you know of any other case besides the Ben Blue case in the last year that a jeopardy assessment has been levied on after a criminal investigation had been started? A. I can't recall of any, but there might have been.

Q. Do you review these recommendations? A. I do." [R. T. p. 89.]

The situation before the District Court was indeed unique. Blue had been compelled to file a verified petition in the Tax Court to protect his property and then fourteen months later, after the petition had been forwarded to the prosecutive authorities the indictment was brought. The following colloquy between the Court and Government Counsel regarding the disposition of the verified petition reveals the court's concern about this feature of the case:

"The Court: I have no idea, counsel, and I cannot reach that until we get to it. All I am saying is that now it has been established that the petitioner, the defendant in this case, did file in the Tax Court before the matter was presented to the Grand Jury a verified petition, and all I am ordering now is that you produce a copy of that petition, if you have it.

Mr. Schulman: I will stipulate, your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the testimony so far are presently a part of the United States Attorney's case file.

The Court: And came with the Special Agent's report?

Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice."

The District Court was not passing upon some generalized or hypothetical situation but on the effect on Ben Blue of the actions of Government officials under "circumstances peculiar to this case." [R. T. p. 144.]

The Court did not rule upon the constitutionality of the sections under which Ben Blue was indicated or the Code provisions for jeopardy assessments. The Court simply concluded that under the circumstances peculiar to the Ben Blue prosecution the defendant could not have a fair trial.

ARGUMENT.

This Court in *United States v. Mersky,* 361 U.S. 431 expressly refused to decide whether the appeal involved a plea in bar. It held that the appeal had to do with the construction of a statute and stated "in view of this conclusion, we need not pass upon the claim that the District Court sustained in effect a 'Motion in Bar'" (at page 438). In separate opinions Justices Brennan and Whittaker stated that they were of the opinion that the Court had sustained a plea in bar. Justice Stewart in a dissenting opinion in which Justices Frankfurter and Harlan joined, said that the case was not one which involved either the invalidity or the construction of the statute. They were further of the opinion that the case did not involve a Motion in Bar.

Regarding *United States v. Storrs,* 272 U.S. 652 and *United States v. Hark,* 320 U.S. 531, Justice Frankfurter in his dissent said,

> "In Hark the Court did not notice the Storrs analysis and gave a colloquial meaning to the phrase. Having to choose between these two decisions, I follow Storrs because it applied the appropriate criterion of construction." (at page 453).

This Court recognized in its opinion in *United States v. Murdock,* 284 U.S. 141, the traditional test of a plea in bar. It said:

> "A special plea in bar is appropriate where defendant claims former acquittal, former conviction, or pardon (2 Bishop New Criminal Procedure (2d Ed.) §§742, 799, 805 et seq.) but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact."

The right of the Government to appeal in a criminal case is not favored. *Carroll v. United States,* 354 U.S. 394, 400, 1 L. Ed. 2d 1442, 1446, 77 S. Ct. 1332, 1336; *United States v. Apex Distributing Co., Inc.,* 270 F. 2d 747, 749, 751 (CA-9, 1959); *United States v. Heath,* 260 F. 2d 623 (CA-9, 1958).

If the restrictions on appeal should be relaxed it seems not to call for judicial remedy but for action by the legislature. This Court noted in the *Carroll* case:

> "It is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." (Fn. 27.)

And furthermore, we may be mindful of the fact that if the lower Court commits an egregious error the extraordinary writ of mandamus is available to prevent a miscarriage of justice.

Last year this Court handed down the decision of *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653 (1964). That case held that a defendant had the right to claim the privilege against self-incrimination in State investigatory proceedings, where the testimony he would have been required to give would not incriminate him under State law but where there was possible incrimination under Federal law. In the course of the opinion, the majority decision referred to the case of *Boyd v. United States,* 116 U.S. 616 (1886) as that "great case" and relied heavily upon the tenets and theories therein set out. This Court said:

> "In thus returning to the *Boyd* view that the privilege is one of the 'principles of a free Government' 116 U.S. 632. *Mapp v. Ohio,* 367 U.S. 643

> necessarily repudiated the *Twining v. New Jersey,* 211 U.S. 78 concept of the privilege as a mere rule of evidence 'best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient' 211 U.S. 113."

The *Boyd* case is particularly applicable in the instant situation. That decision involved an information filed by the United States for forfeiture of goods under a statute providing for fines from $50 to $5,000 and two years imprisonment or both, together with forfeiture of goods, if any owner or importer should, with intent to defraud the revenue, make, or attempt to make, entry of imported merchandise by means of fraudulent invoices, affidavits, letters of false statements or by any act whereby the Government was deprived of its lawful duties on said merchandise. The plaintiffs in error claimed the goods in question and the quantity and value of 29 cases of merchandise previously imported became a material issue. The District Attorney offered an order directing production of the invoice for the previous shipment from the claimants. The claimants produced the invoice but objected that in a suit for forfeiture, no evidence could be compelled for claimants. Had the invoice not been produced, the document would have been assumed to read as contended by the District Attorney.

It was held that the procedure used was an unlawful search and seizure under the Fourth Amendment because it compelled the claimant to testify against himself.

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any

> forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of (the Fourth and Fifth Amendments). 116 U.S. 616, 630."
>
> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

It is not as though the defendant here is being treated the same as defendants in other criminal tax cases. There is a long standing policy of the Internal Revenue Service not to institute any kind of assessment proceedings against a man who is to be prosecuted criminally. This policy was not followed in the instant case and no explanation for the deviation appears in the record of this case. There are several recent decisions concerning the necessity of equality in the administration of rights given by statute in criminal cases although those rights are not required to be extended by the due process clause of the Fourteenth Amendment. Thus in *Griffin v. Illinois,* 351 U.S. 18, there was in question the practice of the State of Illinois to require payment for the transcript of the record on appeal. If an indigent defendant did not have the money to purchase the transcript, he could not make the appeal. The Court said that while the due process clause does not require a right to appeal, if it is given in due course,

the right cannot be made to depend upon the financial ability of the defendant to pay for it. And in *Douglas v. California,* 372 U.S. 353, the indigent defendants were convicted in the lower State Court and requested the appointment of counsel for appeal. The California Appellate Court, as it was required to do under *People v. Hyde,* 51 Cal. 2d 152, 154, reviewed the record of the trial and decided that "no good whatever could be served by appointment of counsel" for the appeal. The Supreme Court held that a State may not grant Appellate review in such a way to discriminate against some convicted defendants on account of their poverty. Other cases with similar decisions in recent years are *Draper v. Washington,* 372 U.S. 487 and *Coppedge v. United States,* 369 U.S. 438.

In dismissing the indictment in this case the District Court did not sustain a plea in bar on the traditional ground of former acquittal, former conviction or pardon but exercised its inherent power to do justice. It specifically referred to the peculiar circumstances of the case and cast no shadow on the statutory structure of the Internal Revenue Code. The Government has many criminal and civil sanctions which it may impose and its power may be freely and efficiently exercised to protect the revenue without denying a defendant a fair trial. The decision of the District Court was clearly right and no substantial question is presented on this appeal. In exercising its inherent power to do justice the Court dismissed the indictment and such a judgment is not reviewable by this court under Sec. 3731 of Title 18 U.S.C.

Conclusion.

It is submitted that this Court does not have jurisdiction of the appeal and that the Motion to Dismiss should be granted.

In the alternative it is contended that the questions presented by this appeal are unsubstantial and that the judgment of the District Court should be affirmed.

Respectfully submitted,

ERNEST R. MORTENSON,

Counsel for Appellee.

Dated: 28th day of October, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 531

UNITED STATES OF AMERICA, APPELLANT

v.

BEN BLUE

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES REGARDING JURISDICTION

OPINIONS BELOW

The district court wrote no opinion. The district judge's orally announced decision appears as Appendix A, pp. 9–14, *infra*. The opinion of the court of appeals certifying the appeal to this Court is reported at 350 F. 2d 267, and is set forth in Appendix B, pp. 15–27, *infra*.

JURISDICTION

On February 8, 1965, the district court dismissed the indictment on the ground that appellee had been compelled to be a witness against himself because of the necessity of filing petitions for review of jeopardy

795-055—65——1

assessments in the Tax Court. The government filed a notice of appeal to the Court of Appeals for the Ninth Circuit on March 8, 1965. On August 16, 1965, the court of appeals granted the government's motion to certify the appeal to this Court on the ground that the decision of the district court sustained a motion in bar. A petition for rehearing and rehearing *en banc* was denied on September 15, 1965. Jurisdiction is invoked under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether the district court's dismissal of the indictment on the ground that appellee had been compelled to incriminate himself in a civil tax proceeding was a decision "sustaining a motion in bar."

2. Whether the district court properly dismissed the indictment against appellee on the ground that he had been compelled to testify against himself in a contemporaneous civil proceeding in which he sought to have tax assessments set aside.

STATUTE INVOLVED

18 U.S.C. 3731 provides, in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

STATEMENT

Appellee was charged in a six-count indictment filed in the United States District Court for the Southern District of California on August 6, 1964, with wilfully attempting to evade his income taxes for the years 1958 through 1960, in violation of Section 7201 of the Internal Revenue Code of 1954, and with making false tax returns for Merry-Go-Round, Inc., for the same years, in violation of Section 7206(1) of the Code. In a motion to dismiss the indictment, appellee alleged that he was informed in November 1962 that consideration was being given to a criminal prosecution against him for income-tax evasion; that on April 9, 1963, a jeopardy assessment was issued against his known assets (Section 6861 of the Code); and that on June 6, 1963, statutory notices of deficiencies were issued, giving him 90 days in which to file petitions for review in the Tax Court (II R. 19–21, 31).[1] Appellee filed such petitions (Defendant's Exs. A, D, E and F), in which he denied knowledge of any unreported income or tax deficiencies, in the Tax Court in July 1963.

Appellee urged, *inter alia,* that the filing of these petitions in the Tax Court, while criminal proceedings were being contemplated, amounted to compulsory self-incrimination in violation of the Fifth Amend-

[1] The record in this Court consists of three volumes in addition to exhibits. Vol. I is the original record of proceedings in the district court and in the court of appeals. Vol. II is the 151-page transcript of proceedings on February 8, 1965, when the indictment was dismissed. Vol. III is the 10-page transcript of proceedings at the arraignment on August 17, 1964.

ment. The government argued that there was nothing in the petitions which might be incriminatory and that, in any event, evidence unfairly obtained in this regard might be excluded at appellee's trial but did not warrant dismissal of the indictment (II R. 15). The district court dismissed the indictment, stating (pp. 10–11, *infra*):

> * * * I am satisfied that * * * because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the court should dismiss the Indictment, and I will dismiss it on that ground alone.
>
> * * * * *
>
> * * * I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.

ARGUMENT

1. The court of appeals properly certified the case to this Court. The effect of the district court's judgment[2] is forever to bar prosecution for the offense charged on the ground of affirmative matter not appearing on the face of the indictment but alleged by

[2] No separate order dismissing the indictment was entered. As the court of appeals observed, "the only order in the record [is] a minute order which reads in pertinent part: '* * * indictment dismissed; defendant discharged; bond exonerated'" (p. 17, *infra*).

appellee in his motion to dismiss. It follows that this Court has jurisdiction under 18 U.S.C. 3731. *United States* v. *Hark,* 320 U.S. 531, 536; *United States* v. *Murdock,* 284 U.S. 141, 147; *United States* v. *Thompson,* 251 U.S. 407, 412; *United States* v. *Oppenheimer,* 242 U.S. 85, 87. The clause of 18 U.S.C. 3731 which permits a direct appeal to this Court from a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy", was enacted in 1907 (34 Stat. 1246) to prevent a recurrence of the situation in *United States* v. *Armour and Co.,* 142 Fed. 808 (N.D. Ill.), where a district judge held that certain defendants in an antitrust prosecution, by furnishing information to the government, had obtained statutory immunity from prosecution. See *United States* v. *Mersky,* 361 U.S. 431, 452 (dissenting opinion); Frankfurter and Landis, *The Business of the Supreme Court,* pp. 114–119. This case is like *Armour* in practical effect because the district court held here that appellee's conduct in coming forward to challenge the asserted tax deficiencies conferred upon him immunity from criminal prosecution. See, also, *United States* v. *Hoffman,* 335 U.S. 77.

United States v. *Mersky,* 361 U.S. 431, which appellee cites (Motion to Dismiss, p. 7), concerned a dismissal of an information on the ground that the alleged offense had not been set out in the applicable statute and regulations with sufficient clarity. Hence the motion to dismiss resembled a demurrer more than it did a plea in bar. And while this Court cited

several illustrations of a special plea in bar in *United States* v. *Murdock*, 284 U.S. 141 (Motion to Dismiss, p. 7), that enumeration was not meant to be exhaustive. The grounds asserted here by appellee, like pleas of double jeopardy, pardon and statute of limitations, amount to confession and avoidance by reason of some special affirmative matter which is said to bar the prosecution. Consequently, it constitutes a special plea in bar within the historical meaning of that term.

2. On the merits, the district court's ruling was, we submit, plainly erroneous. There was no evidence whatever before the court to show that appellee's indictment had been obtained as a result of information disclosed by appellee in the Tax Court.[3] Indeed, in his Tax Court petitions appellee alleged only that his tax returns were correct as filed and that the Commissioner's income figures were erroneous. Consequently, even assuming *arguendo* that the government may not rely upon incriminating information disclosed in a Tax Court petition when it seeks an indictment against the petitioning taxpayer, there was no evidentiary basis for the district court to suppose that any such conduct was or could possibly have been involved here.

Nor can the district court's order of dismissal be sustained on the ground that it was the only way to insure against misuse at appellee's criminal trial of

[3] Even if the situation had been otherwise, it would not follow that dismissal of the indictment was proper. See *Lawn* v. *United States*, 355 U.S. 339, 349–350.

information obtained by the government from his "compelled" petitions in the Tax Court. Appellee may move under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress any unconstitutionally obtained evidence and may inquire during his trial as to the source of any suspect government proof. See *DiBella* v. *United States*, 369 U.S. 121, 129–130 n. 9; *Lawn* v. *United States*, 355 U.S. 339, 355.[4] The possibility that the government may possess impermissible evidence—which is totally unwarranted on the facts of this case (p. 3, *supra*)—does not justify dismissal of the indictment. Cf. *Costello* v. *United States*, 350 U.S. 359.

There is, finally, no substance to appellee's claim that he is the victim of discrimination because jeopardy assessments were issued against him after he was notified that criminal prosecution was being considered (Motion to Dismiss, pp. 10–11). The indictment was not filed until August 1964; approximately 16 months prior to that time the Internal Revenue Service believed it necessary to protect the public interest by making jeopardy assessments. On its face, the substantial lapse of time between these two measures renders it most unlikely that there was any invidious relationship between them. And, in any event,

[4] *Boyd* v. *United States*, 116 U.S. 616, on which appellee relies (Motion to Dismiss, pp. 8–10), held that a person whose property was being forfeited could not be compelled to produce documents in the forfeiture proceeding. The privilege against self-incrimination was invoked in that case at the juncture where, we submit, it could be asserted here—in response to a demand for specific incriminatory information.

appellee's allegation is that the assessments, not the indictment, were discriminatory. The asserted unfair discrimination in making jeopardy assessments could not infect an otherwise valid indictment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be reversed and the indictment reinstated.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1965.

APPENDIX A

* * * * *

THE COURT. * * *

In the *Summers* case the court there stated that there was no showing that there was a necessity for an accountant in order for the lawyer to render effective service, and that case can be distinguished on that ground and, moreover, it was long prior to the opinion by Judge Fee in *United States* v. *Heath* in the Ninth Circuit.

In the *O'Connor* case, that is not applicable here because there were 22 months after the Indictment was returned before the jeopardy assessment was levied and the court said that it is manifest that during all this long preliminary period the defendant had full opportunity to prepare his defense as well as opportunity after the levying of the assessment to bring that circumstance to the attention of the court.

So there the assets were not tied up, they were free for 22 months after the Indictment was filed.

Here the jeopardy assessment was made before the Indictment was filed, it was made under the uncontradicted testimony of Mr. Mortenson and his uncontradicted affidavit that he was advised in November 1962 that a recommendation would be made for criminal prosecution and the jeopardy assessment was not levied until the following April. So there isn't any doubt but what the Government was proceeding on a collision course with this defendant criminally before the jeopardy assessment was levied.

The question that has disturbed me somewhat as I first glanced at these papers, so much so that I came

795-055—65——2

down yesterday and spent the day trying to resolve some of the questions of law, in view of the fact that the defendant has earned a substantial amount of money in the year 1964 it would seem to me that the court would not be justified in granting the motion to dismiss because he was deprived of his right to counsel, and the testimony is that he has engagements.

Of course I realize that it is true that under the law the Director of Internal Revenue may impose liens or distraints—I guess they call them "liens" now, they used to call them "distraints"—at any time, so I don't think that the defendant would be entitled to a dismissal on that ground.

I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

I read the *Boyd* case, and I am satisfied that under the *Boyd* case and under the *Heath* case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled

and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

Mr. SCHULMAN. May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to, nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.

The COURT. I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.

Mr. SCHULMAN. Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't know if that evidence would be offered or the Government has now said that it is telling the court it would not offer such evidence, and without that admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?

The COURT. I think so, counsel. It is a very narrow ruling and I would like very much to see the matter taken up on appeal and tested, because it is a case of first impression, it is a novel and unusual question, and I take it that if an appeal becomes necessary here perhaps the Government might stipulate to release sufficient funds to permit counsel to represent him on appeal.

Mr. SCHULMAN. Very well. May I have the court's indulgence for just one moment?

The COURT. Yes.

(Conference between counsel.)

Mr. SCHULMAN. Your Honor, just one question?

The COURT. Yes.

Mr. SCHULMAN. If the Government were able to stipulate that certain funds might be released to pay counsel, this would have nothing to do with the court's ruling on the other issue now made?

The COURT. That is right. I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel. I do know, and as you and we all know, the Government may at any time file a lien against earnings, they may file an order of distraint, so they could completely make him impotent financially in the event of an appeal by the Government from this ruling, which I earnestly hope will be taken so that we may establish what the law is in this field.

Mr. SCHULMAN. Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——

The COURT. And followed by an Indictment.

Mr. SCHULMAN. And followed by an Indictment——

The COURT. Yes.

Mr. SCHULMAN. Then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.

The COURT. That is right. I think I have framed my ruling narrowly enough so that the Appellate Court will be able to catch on to it. If they don't, they will frame one of their own.

Mr. SCHULMAN. Your Honor is not going to write an opinion on this?

The COURT. No, I have too much else to do. I am sorry. All I am suggesting is that in the event you do take an appeal that the Government give consideration either to a stipulation that they will not levy a distraint against sufficient money for him to hire counsel to defend him on that appeal.

Mr. SCHULMAN. Well, it may well be that such might be worked out, your Honor, and I suppose if an appeal is in order that the time to determine that will be after the matter is back in the District Court, if it is back in the District Court.

The COURT. Well, I think the time to determine it would be while the matter is on appeal. I imagine that the Internal Revenue Bureau and the Department of Justice will probably want to take an appeal here. At least I earnestly hope they do take an appeal.

Mr. MAXWELL. Is bail exonerated, your Honor?

The COURT. Bail is exonerated.

The CLERK. And counsel will prepare an order?

The COURT. No.

The CLERK. Can he appeal from a Minute Order?

The COURT. Yes, he can appeal from a Minute Order and an order. I suppose counsel better secure a copy of the transcript and file it.

Mr. SCHULMAN. Is your Honor discussing the constitutionality in deciding this?

The COURT. No.

Mr. SCHULMAN. You are not saying what rights of the defendant have been violated here.

The COURT. Yes, I am.

Mr. SCHULMAN. This is what confuses me.

The COURT. Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case.

Mr. SCHULMAN. Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?

Mr. MORTENSON. With what?

Mr. SCHULMAN. That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.

Mr. MAXWELL. They have levied on all his assets, your Honor. That wasn't enough to pay the tax.

The COURT. I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient money to pay the tax, and I will draw that inference.

Mr. SCHULMAN. Very well.

The COURT. Court is adjourned.

(Whereupon, at 4:30 o'clock p.m., court was adjourned.)

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 20,007

UNITED STATES OF AMERICA, APPELLANT

v.

BEN BLUE, APPELLEE

[August 16, 1965]

Appeal from the United States District Court for the Southern District of California Central Division

Before: JERTBERG, Circuit Judge, MADDEN, Judge, Court of Claims, and DUNIWAY, Circuit Judge

DUNIWAY, Circuit Judge:

The United States moves that we certify this appeal to the Supreme Court of the United States, pursuant to the provisions of the Criminal Appeals Act, as amended, 18 U.S.C. § 3731. The appellee, Ben Blue, opposes the motion and moves that we dismiss the appeal. We deny Blue's motion and grant the government's motion.

1. *The factual background.*

On August 5, 1964 Blue was indicted on 6 counts. The first 3 counts charge the filing of false and fraudulent income tax returns for the calender years 1958, 1959 and 1960 (26 U.S.C. § 7201). The other 3 counts charge the filing of false income tax returns on behalf of a corporation, Merry-Go-Round, Inc., for the same three calendar years. (26 U.S.C. § 7206(1)). On November 24, 1964 Blue filed a motion to dismiss the

indictment. The grounds are: In the course of an investigation of the income tax returns of Blue and of the corporation for the years in question, and as early as November 13, 1962, Blue and his counsel were advised that the Internal Revenue Service proposed to recommend criminal prosecution of Blue in connection with the tax returns for the years in question. On April 12, 1963 the Service levied a jeopardy assessment against Blue and served him with a so-called 90-day letter, stating the assessment, the claimed deficiencies, and his right to petition the Tax Court for relief. Levies were made on all of his known assets, but these did not produce enough funds to pay the assessments. Within the 90 days, and on July 29, 1963, Blue did file petitions for relief with the Tax Court. These petitions were transmitted to the Enforcement Division of the Internal Revenue Service on October 17, 1963 and from there found their way to the Department of Justice and ultimately into the files of the Assistant United States Attorney handling the prosecution.

2. *The trial court's ruling.*

Blue's motion to dismiss the indictment was based upon two principal contentions: (1) that the levying of the jeopardy assessment deprived him of access to all of his assets and thereby prevented him from being adequately represented by counsel and from procuring the services of an accountant in the defense of the criminal charge, and (2) that by tying up all of his assets, the government prevented him from paying the taxes assessed and suing for a refund and, in effect, compelled him to file petitions with the Tax Court in which, in order to present his case to the Tax Court, he was forced to disclose information in violation of his privilege, under the Fifth Amendment

to the Constitution, against incriminating himself. The motion is supported by an affidavit of his counsel, and at the hearing various witnesses testified.

At the conclusion of the hearing the court granted the motion but wrote no opinion, the only order in the record being a minute order which reads in pertinent part: "* * * indictment dismissed; defendant discharged; bond exonerated." It found against Blue's first contention, but sustained his second contention.[1]

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[1] At the conclusion of the hearing, the court first stated that it could not sustain the first contention, because Blue had earnings and earning capacity and so was able to employ counsel and other assistants. It then made the following remarks, among others:

"I am much bothered, however, by the fact that the Jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was ging to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

"The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice, and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

"I read the *Boyd* case, and I am satisfied that under the *Boyd* case and under the *Heath* case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

"Mr. SCHULMAN [government counsel]. May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to,

3. *The sufficiency of the notice of appeal.*

One ground upon which Blue asks us to dismiss the government's appeal is that notice of appeal does not state the name of any court to which the appeal is taken. The notice does, however, contain all of the material that is required by Rule 37 of the Federal Rules of Criminal Procedure. On the other hand, it does not con-

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nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.

"The COURT. I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.

"Mr. SCHULMAN. Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't know if that evidence would be offered or the Government has now said that it is telling the court it would not offer such evidence, and without the admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?

"The COURT. I think so, counsel. * * * I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel."

* * * * *

"Mr. SCHULMAN. Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a

form to Rule 10 of the Rules of the Supreme Court, which relate to appeals to that Court. Apparently, counsel who prepared the notice read Rule 37, but did not look at the accompanying Form 26, which contains

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jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——

"The COURT. And followed by an Indictment.

"Mr. SCHULMAN. —and followed by an Indictment.——

"The COURT. Yes.

"Mr. SCHULMAN. —then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.

"The COURT. That is right."

* * * * *

"Mr. SCHULMAN. Is your Honor discussing the constitutionality in deciding this?

"The COURT. No.

"Mr. SCHULMAN. You are not saying what rights of the defendant have been violated here."

* * * * *

"Mr. SCHULMAN. This is what confuses me.

"The COURT. Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the *Boyd* case.

"Mr. SCHULMAN. Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?

"Mr. MORTENSON [Counsel for Blue]. With what?

"Mr. SCHULMAN. That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.

"Mr. MAXWELL [Co-counsel for Blue]. They have levied on all his assets, your Honor. That wasn't enough to pay the tax.

"The COURT. I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient money to pay the tax, and I will draw that inference."

a recital that the appellant appeals "to the United States Court of Appeals for the ------ Circuit." In fact, on the day the notice of appeal was filed, the Clerk of the District Court forwarded a copy of the notice of appeal and a statement of the docket entries to the Clerk of this court, as is required byRule 37(a)(1), and mailed a copy to counsel for Blue, as is also provided in the rule. We think that the failure of the notice to name the court to which the appeal is taken is immaterial, since the appeal normally will come to this court, as the rule itself indicates, and the regular procedure was in fact followed. Our view is strengthened by the fact that the Criminal Appeals Act provides for a transfer of an appeal to the proper court if the appellant should appeal to the wrong court. This, rather than dismissal, is the remedy calculated to assure a just disposition of the case. The is precisely the sort of technical objection that the Rules were designed to eliminate. (Rule 2) We therefore hold that this ground for dismissal is without merit.

4. *The motion that we certify the appeal to the Supreme Court.*

The Criminal Appeals Act lists three sets of circumstances under which an appeal may be taken by the United States direct to the Supreme Court. The Third and the only one which could be applicable here reads as follows:

> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The government contends that what the court did here was, in essence, to sustain a motion in bar. It is conceded that Blue has not yet been put in jeopardy.

In the first case construing the statute, *United States* v. *Celestine*, 1909, 215 U.S. 278, the Court held,

without elaboration, that the sustaining of a plea which challenged the jurisdiction of the Federal Court over an Indian, was the sustaining of a special plea in bar. This was followed by *United States* v. *Barber,* 1911, 219 U.S. 72. In that case the trial court sustained what was denominated a plea in abatement, the basis of which was that the prosecution was barred by the statute of limitations when the indictment was found. The Court held that the substance of the action of the Court, and not the label that attached to it, should determine whether the Court's action was the sustaining of a plea in bar. It then laid down the following rule:

> "As said by counsel for the Government, 'the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both civil and criminal procedure, as a plea in bar and not one in abatement.'" (p. 78)

This decision was followed in *United States* v. *Oppenheimer,* 1916, 242 U.S. 85 and in *United States* v. *Goldman,* 1928, 277 U.S. 229.

In *United States* v. *Thompson,* 1920, 251 U.S. 407, the trial court quashed an indictment on the ground that when a prior Grand Jury had had the case presented to it and refused to indict, the United States Attorney could not then take the matter again to a second Grand Jury and obtain an indictment. The Court held that this amounted to the sustaining of a plea in bar "because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment, but as to all subsequent ones for

the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based." (p. 412)

In *United States* v. *Storrs,* 1926, 272 U.S. 652, the defendants, indicted for a conspiracy to use the mails to default, pleaded in abatement certain irregularities in the proceedings of the Grand Jury, and the Court dismissed the indictment. The irregularities had nothing to do with the merits—with the right of the government to prosecute. They could readily be avoided in obtaining a new indictment. At the time of the dismissal the statute of limitations had run. The Court held that the fact that the statute of limitations had run after the indictment was found did not convert the plea in abatement into a plea in bar, and that the plea in abatement did not amount to a plea in bar because it did not look to barring the action, but only to abating it. In the course of his opinion, Mr. Justice Holmes used the following language: "The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense." *United States* v. *Thompson, supra* was distinguished and was said to go "to the extreme point."

The next decision is *United States* v. *Murdock,* 1931, 284 U.S. 141. Murdock was indicted for refusing to answer questions put to him by an Internal Revenue Agent acting under a summons that had been served upon Murdock. He entered a plea to the indictment, the basis for which was that if he had answered the questions he would have been compelled to become a witness against himself in violation of the Fifth Amendment. The Court sustained the plea and discharged him. The Court said that the effect of the order was "to bar further prosecution for the offense charged," (p. 147) and that consequently, it amounted

to a plea in bar. It cited all of the foregoing cases except *Celestine.* In *United States* v. *Hark,* 1944, 320 U.S. 531, Hark was indicted for violating a maximum price regulation issued under the Emergency Price Control Act of 1942 (56 Stat. 23). The Court granted a motion to quash on the ground that, because the regulation had been repealed subsequent to the offense charged, the defendant could not be prosecuted. This was held to be a bar to the prosecution, and therefore, in substance, a plea in bar, citing *Thompson, Barber* and *Oppenheimer, supra.*

United States v. *Hoffman,* 1948, 335 U.S. 77, involved criminal contempt proceedings against Hoffman based upon a charge that he had violated an injunction prohibiting him from selling used cars at over ceiling prices, in violation of the Emergency Price Control Act. A rule to show cause was dismissed on his motion on the ground that he was entitled to immunity under Section 202(g) of the Act. The jurisdiction of the Supreme Court was sustained under the Criminal Appeals Act, but no party seems to have contended that the order of the Court did not amount to the sustaining of a plea in bar, the only question being whether the United States, as distinguished from the Administrator of the Office of Price Administration, was the plaintiff in the injunction case, and so could appeal.

Finally, there is the decision in *United States* v. *Mersky,* 1960, 361 U.S. 431. In that case, one of the questions involved was the construction of certain regulations issued by the Secretary of the Treasury under 19 U.S.C. § 1304. A majority of the Court held that a dismissal of the information, based upon the determination of the court below that the acts charged did not violate the regulation, was a decision dismissing the information based upon the invalidity

or construction of the statute upon which the indictment or information is founded, this being another ground for direct appeal to the Supreme Court under Section 3731 of Title 18. The majority therefore expressly declined to reach the question whether the action of the trial court also amounted to the sustaining of a motion in bar. Mr. Justice Brennan, with whom Mr. Justice Whittaker agreed, was of the opinion that the Court had sustained a plea in bar because the judgment was one "which will end the cause and exculpate the defendant." He relied upon *Hark*, *Murdock* and *Storrs, supra.* Mr. Justice Frankfurter and Mr. Justice Stewart, with whom Mr. Justice Harlan concurred, were of the opinion that the Court's decision did not amount to a sustaining of a plea in bar. Mr. Justice Frankfurter relied upon the *Storrs* case, *supra,* feeling that *Hark, supra,* was wrongly decided. Mr. Justice Stewart was of the same opinion, and at page 457 of his dissent, he states the technical history of the concept of a special plea in bar as one which sets up affirmative defenses which would bar the prosecution and he points out that each of the decisions that we have cited above involves action of this character.

This court, in *United States* v. *Apex Distributing Company,* 9 Cir., 1959, 270 F.2d 747, held that the mere fact that an order purports to dismiss a criminal proceeding "with prejudice" does not make it the sustaining of a plea in bar, and that the dismissal of an indictment for failure by the government to obey a pretrial order for the production of documents was not the sustaining of a plea in bar. The ground for dismissal in *Apex* could have been cured by compliance with the pretrial order. Thus the plea was clearly not a plea in bar within the meaning of the statute. In accord is *United States* v. *Heath,* 9 Cir.,

1958, 260 F. 2d 623 at 629, *ff*. There we laid down the rule that "a motion in bar destroys the right of action and bars prosecution." The motion there was similar to that in *Apex*. The government had lost certain papers of the defendant, necessary to his defense. If the government should find them, it could then proceed. Thus the granting of the motion did not destroy the right of action or bar the prosecution.

At first blush, *United States* v. *Brodson*, 7 Cir., 1956, 234 F. 2d 97 seems squarely in point. There the trial court sustained a motion almost identical to the one here. However, the self-incrimination question was not raised. The court granted the motion on the ground that the jeopardy assessment prevented the defendant from preparing his defense, by depriving him of funds with which to do so. This ground could have been avoided by the government by cancelling the assessment, or by releasing sufficient funds to enable the defendant to defend himself. The Court of Appeals held that this was merely an abatement of the action, not the sustaining of a plea in bar, and declined to certify the appeal to the Supreme Court. It cited *Goldman* and *Murdock, supra* and it specifically distinguished *Murdock* as being a decision involving a dismissal based on the constitutional guarantee against self-incrimination. We do not think that *Brodson* is in point. Here, the trial court specifically rejected the ground upon which the trial court in *Brodson* granted the motion. Here, the court's order was specifically based (see *footnote 1, supra*) on a violation of the Fifth Amendment privilege against self-incrimination.

It is arguable that in this case what the court did was to sustain a plea in abatement because the ground for the motion "has nothing to do with the merits of the criminal action" (*Apex, supra,* 270 F. 2d 750),

but rather arises from an event occurring independently of the finding of the indictment, namely, the filing of the petitions with the Tax Court under compulsion of the jeopardy assessments. On the other hand, the basic facts upon which the order is grounded—the levying of the assessment, and the filing of the petitions in the Tax Court, under the compulsion of the assessment—occurred before the indictment was found. Thus, if the theory on which the motion was granted is sound, the indictment was subject to the fatal weakness with which the trial court thought it was infected at the time when the case was in the womb of the Grand Jury, and it carried the taint when it was born. There is no way, as there was in *Apex,* or *Heath* or *Brodson* or *Storrs,* in which it could be cured. Does not the order, then amount to a sustaining of a plea in bar? Does it not "bar the absolute right of the United States to prosecute" (*Thompson, supra*) or "bar further prosecution of the offense charged" (*Murdock, supra*)? We think that it does, and that the motion to certify the appeal to the Supreme Court should be granted. If the trial court's views are correct, there is no possible way in which the defect in the indictment can be cured, in this case or in any other indictment that may be found. The decision thus amounts to an acquittal of Blue. It makes no difference whether the decision was correct. That is what the appeal is about.

Under the Criminal Appeals Act, an appeal does not lie to this court in a case "where a direct appeal to the Supreme Court of the United States is provided by this section." (18 U.S.C. § 3731) We need not, therefore, consider whether, if not appealable to the Supreme Court, the decision could be appealed to this court.

The motion to dismiss the appeal is denied. The motion to certify the appeal to the Supreme Court is granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 531

UNITED STATES OF AMERICA, APPELLANT

v.

BEN BLUE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The district judge's orally announced decision appears at R. 65–69. The opinion of the court of appeals certifying the appeal to this Court (R. 118–127) is reported at 350 F. 2d 267.

JURISDICTION

Appellee's indictment was dismissed on February 8, 1965. The government filed a notice of appeal to the Court of Appeals for the Ninth Circuit on March 9, 1965 (R. 22–23). On August 16, 1965, the court of appeals granted the government's motion to certify the appeal to this Court on the ground that the decision of the district court sustained a motion in bar

(R. 118–127). Jurisdiction is invoked under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether the district court's dismissal of the indictment on the ground that appellee had been compelled to incriminate himself in a civil tax proceeding was a decision "sustaining a motion in bar".

2. Whether the district court properly dismissed the indictment against appellee on the ground that he had been compelled to testify against himself in a contemporaneous civil proceeding in which he sought to have tax assessments set aside.

STATUTES INVOLVED

18 U.S.C. 3731 provides, in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Section 7201 of the Internal Revenue Code of 1954 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

Section 7206(1) of the Internal Revenue Code of 1954 provides:

> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, which he does not believe to be true and correct as to every material matter * * *
>
> * * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than 3 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7206.)

STATEMENT

A six-count indictment filed in the United States District Court for the Southern District of California charged appellee with wilfully attempting to evade his personal income taxes for the tax years 1958, 1959 and 1960 and with filing false returns for a corporation, Merry-Go-Round, Inc., for the same years in violation of Sections 7201 and 7206(1) of the Internal Revenue Code (R. 1–4). Appellee pleaded not guilty (R. 5) and subsequently moved to dismiss the indictment on the ground that various civil tax proceedings prior to the filing of the indictment rendered a fair trial on the criminal charges impossible and violated appellee's Fourth, Fifth and Sixth Amendment rights (R. 6–12). After a hearing on the motion, the dis-

trict court ordered the indictment dismissed on the ground that appellee "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself" (R. 66).

The evidence adduced at the hearing showed that in November 1962 appellee's counsel had been advised that consideration was being given to the institution of criminal proceedings against appellee for the years 1958 through 1960 (R. 13). Counsel attended conferences with Internal Revenue Service officials in November 1962 and in March 1963, and on each occasion he was advised that criminal prosecution would be recommended (R. 13–14). On April 9, 1963, a jeopardy assessment against appellee's known assets was issued pursuant to Section 6861 of the Internal Revenue Code of 1954 (R. 33), and on June 6, 1963, statutory notices of deficiencies for each of the tax years involved were issued. These notices gave appellee ninety days in which to file petitions for review in the Tax Court (R. 74–80, 85–92, 102–106).

Appellee filed petitions in the Tax Court to review these deficiencies on July 29, 1963 (R. 39, 42). The petitions verified by appellee[1] preliminarily recited (1) appellee's name and address and the name and address of the corporation, (2) the office at which the returns at issue were filed and the date on which the deficiency notices were mailed, and (3) the deficiencies

[1] One of the four petitions in the record bears only the verification of appellee's wife, on whose behalf alone the petition was filed (R. 92–94). That petition is similar to the ones verified by appellee.

and penalties asserted by the Commissioner of Internal Revenue (R. 70–71, 80–81, 99–100). Each petition then individually enumerated every specific adjustment contained in the underlying deficiency notice and alleged that it was erroneous (R. 71–72, 81–82, 100). The petitions all concluded with allegations repeating, in affirmative form, the specific assertions of error contained in the earlier paragraphs (R. 71–72, 82–84, 101).[2] Appellee was indicted on August 5, 1964 (R. 1).

[2] Appellee's petition with regard to the 1960 tax year is illustrative. Paragraph 4 of the petition reads as follows (R. 100):

> 4. The determination of deficiency and penalties set forth in said deficiency notice are based upon the following errors:
>
> 1960
>
> a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which he did not report on his return for the year 1960.
>
> b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.
>
> c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.
>
> d. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1960 was due to fraud with the intent to evade tax.

Paragraph 5 of the petition reads (R. 101):

> 5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:
>
> a. Petitioner received no dividend distributions which he failed to report on his return.
>
> b. Petitioner received no distributions taxable as long

Appellee argued, *inter alia*, that the effect of the jeopardy assessment and the deficiency notices, issued at a time when criminal prosecution was contemplated, was to compel him "to testify against himself" and "to sign petitions that went to the Tax Court" (R. 27). Appellee's position in this regard was summarized in the following assertion contained in his motion to dismiss (R. 11):

> That by virtue of the assertion of taxes, penalties and interest against the defendant, the filing of income tax liens and the seizure of his assets, the defendant has been compelled to execute statements of fact pertaining to his income tax liabilities for the years 1958 to 1960, inclusive, in pleadings required to be presented to the Tax Court of the United States and to the Internal Revenue Service, thereby compelling this defendant to testify against himself in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The district court sustained the motion to dismiss on the ground that "when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court * * * they foreclosed themselves from proceeding in

---

term capital gains which he failed to report on his return.

c. Expenses deducted for the use of a separate office in Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

d. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

the criminal case during that time" (R. 66).[3] The court made this ruling notwithstanding government counsel's representation that the government would not "in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant" (R. 66).[4]

SUMMARY OF ARGUMENT

I

The court of appeals properly certified the case to this Court. The effect of the district court's judgment is forever to bar prosecution for the offense charged on the ground of affirmative matter not appearing on the face of the indictment but alleged by appellee in his motion to dismiss. It follows that this Court has jurisdiction under 18 U.S.C. 3731, which permits a direct appeal to this Court from a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." This clause was enacted in 1907 to authorize an appeal by the government from rulings such as that in *United States v. Armour and Co.*, 142 Fed. 808 (N.D. Ill.), where defendants claimed immunity from prosecution because they had previously testified under subpoena. The decision in this case sustained a "motion in bar"

[3] No separate order dismissing the indictment was entered. The relevant minute order reads, in pertinent part, "* * * indictment dismissed; defendant discharged; bond exonerated" (R. 22).

[4] The court also held that appellee had "not made a sufficient showing as a matter of fact" that the jeopardy assessments so tied up his assets as to make it impossible for him to employ counsel (R. 67).

irrespective whether this Court adopts the construction given that phrase in the opinion of Mr. Justice Brennan in *United States* v. *Mersky*, 361 U.S. 431, 441–442, or the definition stated in the opinion of Mr. Justice Stewart in the *Mersky* case. 361 U.S. at 457.

II

A. The district court erred on the merits because it mistakenly assumed that the Tax Court petitions contained matter which incriminated appellee. An examination of those petitions will disclose, however, that there are no self-incriminatory admissions contained in them; they are merely blanket denials of the allegations made in the deficiency notices. Consequently, there is no factual basis for the district court's conclusion that self-incriminatory statements were improperly obtained as a result of the civil tax proceedings.

B. In any event, if self-incriminatory statements had been obtained, appellee's proper remedy would have been to move to suppress their use as evidence or to exclude them during his criminal trial. The exclusionary rule has become the customary remedy afforded whenever government agents have obtained evidence in violation of a constitutional provision, statute or rule of procedure. There is surely no more reason to invoke the drastic remedy of dismissing an indictment when incriminatory statements have been obtained in the manner claimed here than when a confession is improperly coerced or when evidence is obtained by an unlawful search or seizure. This is not a case in which the accused's trial has necessarily been

rendered unfair by anything done or omitted by government agents. Moreover, the government's conduct was not reprehensible in any way. Government agents took the minimum precautions necessary to insure the collectibility of tax obligations while safeguarding all of appellee's rights.

ARGUMENT

I

THIS COURT HAS APPELLATE JURISDICTION BECAUSE THE DISTRICT COURT SUSTAINED A MOTION IN BAR

This case was certified by the court of appeals to this Court at the government's request pursuant to the concluding provision of 18 U.S.C. 3731 because, in the court of appeals' view, the district court's dismissal of the indictment was a "decision or judgment sustaining a motion in bar" within the meaning of the fourth paragraph of 18 U.S.C. 3731. This determination on the threshold jurisdictional issue was plainly correct.

The meaning of the term "motion in bar" was most recently mooted by Justices of this Court in *United States* v. *Mersky,* 361 U.S. 431, 441–450, wherein two members of the Court (Justices Brennan and Whittaker) expressed the view that a judgment sustaining a motion in bar for purposes of the Criminal Appeals Act is any judgment which "will end the cause and exculpate the defendant." 361 U.S. at 441. Three members of the Court (Justices Frankfurter, Harlan and Stewart) construed the words "motion in bar" as limited to the kind of pleading which had been known to the common law

as a "special plea in bar"[5]—*i.e.*, a "plea in confession and avoidance [which] did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect." 361 U.S. at 457.

The judgment being reviewed in this case was a decision sustaining a "motion in bar" under either of these interpretations. The district court held that appellee could never be criminally prosecuted for having evaded taxes in the years 1958 to 1960 because the government, by making it necessary for him to file petitions in the Tax Court, had compelled him to provide self-incriminatory information with regard to the alleged offenses.[6] The defense sustained by the court was, therefore, "in bar of the prosecu-

[5] The Criminal Appeals Act, as enacted in 1907, permitted the government to appeal, *inter alia*, "[f]rom the decision or judgment sustaining a special plea in bar, where the defendant has not been put in jeopardy." 34 Stat. 1246. The words "motion in bar" were substituted for "special plea in bar" in 1948 after the adoption of the Federal Rules of Criminal Procedure which had, in Rule 12, abolished the pleading forms known as special pleas, demurrers and motions to quash.

[6] Although the trial judge said, at one point in the colloquy with government counsel, that the government had "foreclosed themselves from proceeding in the criminal case *during that time*" (R. 66; emphasis added), it seems entirely clear that the court's ruling did not merely suspend the time in which a criminal prosecution could be brought. Having once compelled appellee to come forward, the government would, under the district court's reasoning, necessarily be precluded from ever bringing a criminal prosecution regarding the same matter. As the court of appeals observed, "If the trial court's views are correct, there is no possible way in which the defect in the indictment can be cured, in this case or in any other indictment that may be found" (R. 127).

tion; to sustain it was to end the cause and exculpate the defendants." *United States* v. *Hark,* 320 U.S. 531, 536.

The appellee's motion to dismiss was also a "special plea in bar" in the sense that that phrase was technically construed in 1907. The 1897 edition of *Bouvier's Law Dictionary* states (Vol. 2, at p. 679): "Special pleas in bar admit the facts alleged in the declaration, but avoid the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue."[7] The 1898 edition of *English's Law Dictionary* defines "special plea in bar" (at p. 739) as "[a] plea in bar which sets up new matter." See also Shipman, *Common Law Pleading* (1923 ed.), pp. 30, 336–337, and authorities cited in Mr. Justice Stewart's dissenting opinion in *United States* v. *Mersky,* 361 U.S. 431, at 457.

The indictment against appellee was dismissed because of "new matter" which he asserted by way of

[7] The following distinction made in the 1897 edition of *Bouvier's Law Dictionary* illustrates that a necessary element of a "special plea in bar," as it was defined at the time of the passage of the Criminal Appeals Act, was the assertion of "new matter" in confession and avoidance (at p. 678; emphasis in the original):

> * * * There is, however, a plea to the action which is not strictly either a general issue or a special plea in bar, and which is called *a special issue*, which denies only some particular *part* of the declaration which goes to the *gist* of the action. It thus, on the one hand, denies *less* than does the general issue, and, on the other hand, is distinguished from a "special plea in bar" in this,—that the latter universally advances *new matter*, upon which the defendant relies for his defence, which a special issue never does; it simply *denies*.

confession and avoidance. It was his contention that irrespective of the truth of the indictment's allegations, he could not be criminally prosecuted because of certain antecedent conduct by the government. In this respect the grounds for the motion in this case are strikingly similar to those asserted and sustained in *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D. Ill.)—the decision which aroused public opinion and prompted the enactment of the provision of the Criminal Appeals Act authorizing government appeals from judgments sustaining special pleas in bar. See Frankfurter & Landis, *The Business of the Supreme Court* (1927), pp. 114–119; *United States* v. *Mersky*, 361 U.S. 431, 447–448, 452 (Frankfurter, J., dissenting). In the *Armour* case, a district judge upheld the contention that the defendants in a Sherman Act prosecution had been immunized against criminal liability by the immunity provisions of the Interstate Commerce Commission Act because of their earlier testimony under subpoena.[8] That case, like the present one, turned on facts which were alleged in confession and avoidance and which barred the prosecution. The defendants there, like the appellee here, maintained that the government had, by its prior conduct, foreclosed a criminal prosecution on matters

[8] That decision was announced during trial, after the presentation of all the evidence. Consequently, the directed judgment of acquittal would not have been appealable even under the subsequently enacted Criminal Appeals Act because jeopardy had attached. However, the contention could have been asserted as a special plea in bar before trial, and it is likely that Congress was intending to prevent future situations in which such a decision, although constitutionally appealable, would be immune from appellate review.

related to the information obtained on the earlier occasion.

United States v. *Hoffman,* 335 U.S. 77, is also an analogous decision. The accused in that case was charged with contempt for having violated a district court injunction prohibiting sales of used cars at over-ceiling prices. He contended that immunity from prosecution had been conferred upon him in the course of an administrative proceeding. The district court sustained the contention and dismissed the rule to show cause. 68 F. Supp. 53 (D.D.C.). An appeal was taken to the court of appeals, which concluded that the district court's judgment amounted to a judgment sustaining a special plea in bar and certified the case to this Court. 161 F. 2d 881 (C.A. D.C.). This Court held that "the appeal was properly brought under the Criminal Appeals Act" (335 U.S. at 79) and reversed the district court's judgment on the merits.

Where, as was true here and in *Hoffman,* the district court's judgment is based upon a defense allegation which goes beyond the four corners of the indictment and where the effect of the judgment, based solely on the new matter asserted by the defendant,[9] is finally to bar criminal prosecution by the United States for the conduct charged in the indictment, the

[9] This limitation would exclude from the statute's reach a situation in which the foreclosure on prosecution is attributable partly to some circumstance other than the matter raised by the defendant. In *United States* v. *Storrs,* 272 U.S. 652, for example, the fact that the statute of limitations would bar reindictment did not change what was otherwise a plea in abatement into a plea in bar.

judgment is one "sustaining a special plea in bar" within the meaning of the 1907 Act. These same characteristics render reviewable in this Court judgments barring prosecutions on grounds that the statute of limitations has run (*United States* v. *Barber*, 219 U.S. 72, *United States* v. *Goldman*, 277 U.S. 229, 236–237), that the facts are *res judicata* (*United States* v. *Oppenheimer*, 242 U.S. 85), that the regulation establishing the defendant's legal obligation has been revoked (*United States* v. *Hark*, 320 U.S. 531), that the defendant's conduct is not subject to the jurisdiction of a federal court (*United States* v. *Celestine*, 215 U.S. 278), and that a constitutional privilege precludes prosecution for the conduct charged (*United States* v. *Murdock*, 284 U.S. 141). In each of the instances cited, as in this case, a defense in the nature of confession and avoidance was sustained by the district court, and the grounds asserted by the accused, in and of themselves, barred any future criminal prosecution by the federal government for the conduct alleged in the indictment.

Finally, we note that it is immaterial that appellee's motion was titled a "motion to dismiss" (R. 6) rather than a "motion in bar" and that the district court's minute entry recited that the indictment was dismissed, not that a motion in bar was sustained (R. 22). The substance of the motion, not its formal title, determines whether an appeal lies to this Court. See *United States* v. *Chambers*, 291 U.S. 217, 221–222; *United States* v. *Storrs*, 272 U.S. 652, 654; *United States* v. *Thompson*, 251 U.S. 407, 412–413;

United States v. *Barber*, 219 U.S. 72, 78. The district court's action was indistinguishable, in any material respect, from a judgment which would historically have been characterized as one "sustaining a special plea in bar." In every realistic sense it "end[ed] the cause and exculpate[d] the defendant." *United States* v. *Hark*, 320 U.S. 531, 536. Consequently, we believe it clear that this Court has appellate jurisdiction under 18 U.S.C. 3731.

II

THE DISTRICT COURT ERRED IN DISMISSING THE INDICTMENT

Turning to the merits of the case, we submit that the district court erred in two respects in dismissing the indictment in which appellee was charged. *First*, the court's judgment was based on the factual misapprehension that appellee "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself * * *" (R. 66). The deficiency notices and the Tax Court petitions demonstrate, on their face, that appellee was neither required to make self-incriminatory disclosures nor did he make any such disclosures in fact. *Second*, the district court applied the wrong remedy, even assuming *arguendo* that the facts were as it erroneously believed them to be. Had appellee been improperly compelled to make self-incriminatory disclosures, the appropriate remedy would have been to suppress their use—and possibly

the use of their "fruit"—as evidence. Dismissal of the indictment was wholly unwarranted.

In arguing this appeal on these limited grounds we do not intend, of course, to concede that the government is always forbidden to use in a criminal tax prosecution self-incriminatory statements made by a taxpayer in the course of earlier civil tax litigation concerning the same transactions. It is generally the government's policy—as this record shows (R. 59-60)—not to assert civil tax liabilities when criminal proceedings against the taxpayer are contemplated or have been instituted. In exceptional circumstances, however, jeopardy assessments are deemed necessary in order to protect the revenue, and, as a result, civil proceedings may be instituted before the criminal trial is conducted. Whether a taxpayer's verified allegations or testimony in such a civil tax suit (in which he does not invoke a privilege against self-incrimination) may be used against him in a subsequent criminal trial is a question which need not be reached on the facts of this case.[10] This record demonstrates that no incriminatory statements were made, and the relief provided by the district judge was inappropriate no matter how the broader underlying question is resolved.

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[10] This issue is not, of course, limited to tax litigation. In any area which is governmentally regulated through both civil and criminal litigation, a similar problem may arise. Compare, for example, civil and criminal antitrust proceedings or the civil and criminal remedies available in the field of securities regulation.

A. NO SELF-INCRIMINATORY DISCLOSURE WAS MADE BY APPELLEE IN THE CIVIL TAX PROCEEDING

The district court erroneously assumed that appellee was obliged to and did make self-incriminatory disclosures in the Tax Court proceeding in order to preserve his challenge to the Commissioner's assertion of tax deficiencies. In fact, however, no incriminatory admissions were either made or required. The documents filed by appellee in the Tax Court simply denied the allegations made in the deficiency notices and asserted that appellee's challenged tax returns were truthful. The excerpt from one of the Tax Court petitions reprinted in note 2, *supra*, is illustrative of the form which all the petitions took; its contents, we submit, cannot conceivably be incriminatory. They amount to a blanket denial of the allegations made in the deficiency notices and are no more incriminatory than a plea of not guilty to criminal charges.

Neither appellee nor the district court suggested below how the statements made in the Tax Court petitions could be used against appellee in the criminal proceeding. Absent any such showing, the dismissal of the indictment can surely not be sustained on Fifth Amendment grounds. *Boyd* v. *United States*, 116 U.S. 616, on which the district court relied (R. 66), is plainly distinguishable because the material obtained from the taxpayer in that case under compulsion was "to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws * * *." 116 U.S. at 622. But where, as is true here, the information ob-

tained from a taxpayer in the course of a civil proceeding is of no conceivable use "against him"—is, indeed, wholly exculpatory—there is no substance to a Fifth Amendment claim.

B. IF EVIDENCE WAS IMPROPERLY OBTAINED, THE PROPER REMEDY IS NOT TO DISMISS THE INDICTMENT BUT TO EXCLUDE THE EVIDENCE AT APPELLEE'S TRIAL

The unvarying practice in this Court and in lower federal courts with respect to evidence which has been obtained from a criminal defendant in violation of Fourth or Fifth Amendment rights, or in violation of a statute or federal rule of procedure, has been to implement the constitutional protection by an exclusionary rule of evidence. *E.g.*, *Bram* v. *United States*, 168 U.S. 532; *Weeks* v. *United States*, 232 U.S. 383; *Nardone* v. *United States*, 308 U.S. 338; *Mallory* v. *United States*, 354 U.S. 449; *Wong Sun* v. *United States*, 371 U.S. 471. It has never been suggested that official misconduct in obtaining evidence justifies dismissal of an indictment if it is possible to try the accused for the offense alleged without using any evidence which is either directly or derivatively tainted. Consequently, even on its erroneous premise that appellee had been compelled in the civil tax proceeding to make self-incriminatory disclosures, the district court erred in invoking any remedy other than the well established exclusionary rule.

The effect of the district court's ruling is to confer immunity from prosecution on appellee merely because the government took protective steps to insure that his taxes would be collectible if the Commissioner

of Internal Revenue's asserted deficiencies were sustained in an appropriate judicial proceeding. Had government agents coerced a confession from appellee or ransacked his home without a warrant to obtain evidence, appellee would not, under established principles, be entitled to such drastic relief. He could, in such hypothetical circumstances, move under Rule 41(e), F.R. Crim. P., to suppress evidence or object to admission of tainted evidence at his trial. It would be anomalous to grant the more drastic relief of dismissing an indictment and barring prosecution when incriminatory admissions have been obtained by the government for a lawful purpose such as tax collection while limiting redress for coerced confessions to the usual exclusionary rule.

United States v. *Heath,* 260 F. 2d 623 (C.A. 9), on which the district court relied (R. 66), is representative of a totally different situation than that involved here. In *Heath,* government agents had lost a document which was relevant to the accused's defense. Consequently, the court concluded that a fair trial on the charges in the indictment could never be had, and it dismissed the indictment. In *Heath,* as in cases involving excessive pre-indictment delay (see Rule 48(b), F.R. Crim. P.), government misconduct may be said to have rendered a fair trial impossible. But when it is only particular evidence that is allegedly tainted, a defendant may be fairly put to trial on the charges made in the indictment if the impermissible evidence is excluded.

Nor is there any basis for supposing that the allegedly improper evidence infected appellee's indict-

ment. It is well settled that an indictment returned by a legally constituted and unbiased grand jury, valid on its face, is enough to call for a trial of the charge on its merits. *Costello* v. *United States*, 350 U.S. 359. Even if it has been determined that there were violations of an accused's constitutional rights prior to indictment, more than mere suspicion is needed to warrant a judicial investigation into the source of evidence presented to the grand jury. *Lawn* v. *United States*, 355 U.S. 339, 348–350. In the present case appellee laid no foundation and requested no hearing. The court could not presume that improper evidence was presented to the grand jury, and without an evidentiary hearing it had no factual basis on which to dismiss the indictment.

Finally, we note that the government's conduct in this case, even if it had produced self-incriminatory admissions, was not of the kind usually subject to an exclusionary rule. Jeopardy assessments are authorized by law in order to protect the revenue, and government agents took the minimal precautions necessary to that end. The civil proceeding in the Tax Court has been suspended pending the outcome of the criminal trial, and there has been no attempt by government agents to utilize the civil proceeding as a means of eliciting admissions or obtaining discovery of a defense. In short, the government has taken action to protect the revenue while fully safeguarding all appellee's constitutional and statutory rights. There is no basis whatever for penalizing this course of conduct and deterring its repetition by dismissing the indictment against appellee.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, the indictment reinstated, and the cause remanded for trial on the merits.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 531

UNITED STATES OF AMERICA,

Appellant,

vs.

BEN BLUE,

Appellee.

BRIEF FOR APPELLEE.

STATUTES INVOLVED.

Section 6861(a) Internal Revenue Code of 1954:

SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, AND GIFT TAXES.

(a) Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

Tax Court Rules of Practice (Rule 7)

RULE 7.—INITIATION OF A CASE—PETITION—FILING FEE—FORM

(a) Petition.—

(1) *Filing.*—A case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed. (See Rules 4 and 6.)

(2) *Improper petition—Dismissal.*—Failure of a petition to comply with this Rule or with Rule 4 or 6 shall be ground for dismissal of the case. (See also section 6213 *(a)*, and section 7502, Code of 1954, in regard to absolute statutory time limit on filing.)

(b) Fee for filing petition.—The fee for filing a petition with the Court shall be $10, payable at the time of filing. (See Rule 1*(e)*.)

(c) Form of petition.—

(1) The petition shall be substantially in accordance with form a, shown in Appendix I.

(2) It shall be complete in itself so as fully to state the issues.

(3) No telegram, cablegram, radiogram, telephone call, or similar communication will be recognized as a petition.

(4) The petition shall contain:

(*A*) A caption in the following form:

Tax Court of the United States

.....	)	
Petitioner,	)	
v.	)	Docket No.
Commissioner of Internal Revenue, Respondent.	)	

Petition

(*B*) Numbered paragraphs stating:

1. Petitioner's name and principal office or residence, and the office of the director or district director of internal revenue in which the tax return for the period in controversy was filed.

2. The date of mailing of the notice of deficiency on which the petition is based, or other proper allegations showing jurisdiction in the Court.

3. The amount of the deficiency (or liability, as the case may be), determined by the Commissioner, the nature of the tax, the year or other period for which the determination was made and, if different from the determination, the approximate amount of taxes in controversy.

4. Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency. Issues in respect of which the burden of proof is by statute placed upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof. Each assignment of error shall be lettered.

5. Clear and concise lettered statements of the facts upon which the petitioner relies as sustaining the assignments of error, except those assignments of error in respect of which the burden of proof by statute is placed upon the Commissioner.

6. A prayer, setting forth relief sought by the petitioner.

(*C*) The signature of the petitioner or that of his counsel. (See Rule 4(*f*).)

(*D*) A verification by the petitioner.

STATEMENT.

On November 1, 1962 Ben Blue was notified by the Chief of the Intelligence Division, Internal Revenue Service, that consideration was being given to a possible recommendation that criminal proceedings be instituted against him for attempted evasion of his income taxes for the years 1958 to 1960, inclusive, and the income taxes of Merry-Go-Round, Inc. his wholly owned corporation for the same three years. [R. p. 115.]

Ben Blue's counsel attended conferences with Internal Revenue Service officials in November, 1962 and March, 1963, with respect to the proposed prosecution.

In February and March, 1963 Ben Blue executed and filed consents extending the period of limitation for assessment of income taxes against himself and Merry-Go-Round, Inc. [R. pp. 12, 13.]

On April 9, 1963, without notice of any kind to Ben Blue, contrary to general procedure when a criminal investigation is pending, the District Director in Los Angeles made a jeopardy assessment against Ben Blue, Axie Blue (his wife), and Merry-Go-Round, Inc.

All known assets of Ben Blue, Axie Blue and Merry-Go-Round, Inc. were levied upon and seized. [R. p. 14.] The record is void of any evidence justifying the filing of the jeopardy assessments.

At the same time jeopardy assessments were made, the United States made income tax liens of public record pursuant to said assessments. [R. p. 7.]

In statutory notices of deficiencies subsequently issued by the Government for the years 1958 to 1960, inclusive, for Merry-Go-Round, Inc., Ben Blue and Axie Blue, it was conceded that the jeopardy assessments were excessive in amounts. [R. pp. 75-76; 87; 96-97; 103-104.] Nevertheless, the amounts of the liens which corresponded with the jeopardy assessment figures, admitted to be excessive, were never changed to reflect the lesser amounts of taxes. [R. pp. 44-45.]

Within sixty days of the filing of the jeopardy assessments, statutory notices were issued stating that the taxpayers must file Petitions within ninety days of the dates of the notices if the proposed deficiencies were to be contested in the Tax Court of the United States. Ben Blue having had all of his assets seized, could not pay the proposed assessments and had no choice but to file verified Petitions within that time to the Tax Court in order to protect his property. [R. p. 69.]

On August 5, 1964, more than a year after filing the petitions, a six count indictment was filed charging Ben Blue with wilful attempt to evade his personal taxes for the years 1958, 1959 and 1960 and with filing false returns for Merry-Go-Round, Inc. for the same years. [R. pp. 1-4.] The indictment involved the same income and the same years as the statutory notices

issued a year previously against Ben Blue and Merry-Go-Round, Inc. [R. pp. 1-4 and 70-106.]

Ben Blue filed a Motion to Dismiss the Indictment which came on for hearing February 8, 1965. After hearing witnesses and argument of counsel, the District Court granted the Motion and dismissed the indictment. [R. pp. 26-69.]

At the hearing on the Motion to Dismiss, the Assistant United States Attorney refused to stipulate that he had copies of Ben Blue's Petitions to the Tax Court in his file. Counsel requested the Court to order production of the Tax Court pleadings and the Court granted the request. The following colloquy occurred:

> "The Court: . . . and all I am ordering now is that you produce a copy of that petition, if you have it.
>
> Mr. Schulman: (Government counsel): I will stipulate, Your Honor, that each of the petitions filed by Ben Blue, Ben Blue and Axie Blue and Merry-Go-Round which has been referred to in the testimony so far are presently a part of the United States Attorney's case file.
>
> The Court: And came with the Special Agent's Report?
>
> Mr. Schulman: They came to us with the report when it was referred to us from the Department of Justice." [R. p. 51.]

At the hearing on the Motion to Dismiss, Robert Lund, Chief, Intelligence Division, Internal Revenue Service, testified that civil liabilities were generally not

assessed until after the criminal case had been disposed of. [R. p. 59.] With reference to determination as to when a jeopardy situation existed, he testified as follows [R. p. 60]:

> "Q. Are there times when civil liabilities are assessed before the criminal matter is disposed of? A. There have been.
>
> Q. What are the occasions or what are the situations when they are assessed before the criminal matter is disposed of? A. When the *investigating agents* determine that the tax might be in jeopardy because the assets might be dissipated or transferred or removed from the jurisdiction of the country." (Emphasis supplied.)

Ralph Leslie, the Revenue Officer who handled the levies and liens against the taxpayers, testified that he knew a criminal investigation was pending at the time he levied on Ben Blue's assets and filed the liens. He testified that he received information concerning Ben Blue's assets from Mr. Freeman of the Intelligence Division.

Within thirty days of the dismissal of the indictment the Government filed a notice of appeal which did not name the Court to which the appeal was taken. Nevertheless, the Clerk of the District Court referred the matter to the Court of Appeals for the Ninth Circuit. After filing the Notice of Appeal the Government filed a motion in the Court of Appeals to have the matter certified to this Court on the ground that the District Court had sustained a "plea in bar" and that §3731,

Title 18 U.S.C. authorized appeal. The Court of Appeals granted this motion. On January 17, 1966 this Court postponed consideration of the question of jurisdiction and placed the case on the summary calendar.

In summary, while consideration was being given to a possible recommendation of criminal prosecution, a jeopardy assessment was issued against Ben Blue and Merry Go-Round, Inc. All of Ben Blue's assets (amounting to more than $150,000) were seized and liens of record were filed. This was done without any notice to Ben Blue and there is not one iota of evidence in the record to justify the seizure of assets or the filing of liens. When the indictment was brought fourteen months later the petitions which Ben Blue had been forced to file in the Tax Court of the United States were in the United States Attorney's files and had been included with the file when it was forwarded to Los Angeles from the Department of Justice in Washington. That is, the United States Attorney's file included, at the time the matter was presented to the Grand Jury, petitions containing facts verified by Ben Blue which he had been required to file fourteen months earlier in order to protect his property.

SUMMARY OF ARGUMENT.

I.

This Court Does Not Have Jurisdiction of the Appeal.

Section 3731 of Title 18 U.S.C. provides for direct appeal to the Supreme Court "from the decision or judgment sustaining a Motion in Bar, when the defendant has not been put in jeopardy." The Court of Appeals decided to certify this appeal to the Supreme Court on the ground that the District Court dismissal would "bar further prosecution of the offense charged."

There are two definitions of "Motion in Bar." One interpretation is that which supports the certification herein. The other definition, is the one based on the historical meaning of a plea in bar. That is, a plea in bar involved previous acquittal, conviction, attainder or pardon. There is no previous acquittal, conviction, attainder or pardon as to Ben Blue.

Regardless of which interpretation is correct since the District Court dismissed the indictment on the ground the defendant could not have a fair trial (analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure) there is no appeal under §3731 of Title 18 U.S.C.

As was noted in *Carroll v. United States,* 354 U.S. 394, appeals by the Government in criminal cases are not favored. This does not deny the Government a remedy in case of arbitrary action by a District Court because the writ of mandamus is always available.

II.

The Decision of the District Court Is Correct and Should Be Affirmed.

The jeopardy assessment section of the Internal Revenue Code (§6861(a)) provides that "if the Secretary or his delegate believes that the assessment . . . will be jeopardized by delay" he may immediately assess a deficiency. Of course, the District Director in Los Angeles as the "delegate" does not have personal knowledge of the affairs of the millions of taxpayers in his district. As the testimony bears out [R. p. 60] the investigating officer is the one who really arrives at the "belief" necessary to recommend a jeopardy assessment. Mr. Freeman, Special Agent investigating the case, obviously the one who recommended the jeopardy assessment, told Revenue Officers what assets to seize at a time when his recommendation of prosecution of Ben Blue was moving through regular Government channels. The result of the jeopardy assessment was to compel Ben Blue to file Tax Court petitions. Facts which Ben Blue was required to verify in his Tax Court petitions constituted a vital part of the prosecutive file when it was in the Department of Justice in Washington and after it was transferred to the United States Attorney in Los Angeles.

It is not necessary to contend here that the jeopardy assessment provision (§6861(a)) or §7201 and §7206-(1) of Title 18 U.S.C. are unconstitutional because as was stated in *Yick Wo v. Hopkins,* 118 U.S. 356:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

The Chief of the Intelligence Division in the Los Angeles district testified that it was not common practice to make an assessment while a criminal investigation was in progress. In fact, his testimony was that he could not recall any case in his district where jeopardy assessment had been made in such a situation "besides the Ben Bue case in the last year". [R. p. 61.]

The record is devoid of any evidence supporting a justification for the jeopardy assessment. The only reasonable inference is that the Special Agent promoted that procedure to throttle Ben Blue economically and put him in a position where he was required to come forth with verified statements concerning the same income and the same years involved in the criminal prosecution. It is the Government's contention that the Tax Court petitions constituted nothing more than general denials. This completely ignores the fundamental nature of the pleading itself and, of course, once a petition is filed in the Tax Court the case is either settled or a trial is had in regular course.

The Tax Court operates independently of the United States District Court and grants continuances "within its discretion." (Tax Court Rule 20.) In *Chiquita Mining Co. v. Commissioner,* 148 F. 2d 306 (C. A. 9), it was held that refusal of the Tax Court to grant a continuance because of a pending related criminal case was not reversible error. Furthermore, under Rule 45 of the Tax Court rules the Government could have requested that a deposition be taken from Ben Blue. Thus, after the petition is filed depositions could be taken and the case heard before the criminal case comes to trial.

The Government contends that the petitions contained no incriminating statements but amounted to "a blanket denial of the allegations made in the deficiency notices." (Govt. Br. p. 17.)

It also urges that the only remedy is a Motion to Suppress. This is a specious argument in itself but, more importantly, it ignores one fundamental principle. That is: the accused has more than a right to have illegally obtained evidence suppressed or to present evidence in his defense, he has a constitutional right to do nothing.

ARGUMENT.

I.

This Is Not an Appeal Under §3731 of Title 18 and Consequently This Court Does Not Have Jurisdiction.

§3731 of Title 18 U.S.C. provides for direct appeal to the Supreme Court from the decision or judgment of a District Court sustaining a Motion in Bar, when the defendant has not been put in jeopardy. There are two definitions of "Motion in Bar." One interpretation is found in the opinon of the Court of Appeals for the Ninth Circuit in the case now before this Court. *United States v. Ben Blue.* [R. pp. 118-127.] The test there applied was: does the judgment of the District Court "bar further prosecution of the offense charged?" The second definition, as expressed in Footnote 17 in *United States v. Heath,* 260 F. 2d 623 (C. A. 9) is:

> "(17) 'Special pleas in bar * * * without entering into the facts of the offence, show that the defendant ought not at all be called upon to answer the indictment. The principal of these are a previous acquittal, conviction, attainder, and pardon * * *.' 1 Chitty, Criminal Law, 451, 452-470 (4th Cooley Ed., 1899, pp. 1481-1484); 5 Longsdorf, Cyclopedia of Federal Procedure, §§ 2152-2157 (1929); 2 Bishop, New Criminal Procedure, §§742, 805, 2d Ed. 1913)"

There has been no previous acquittal, conviction, attainder or pardon of Ben Blue, hence the above definition of a "plea in bar" can have no application nor does it serve to confer jurisdiction on the Supreme Court in the pending case.

The Court of Appeals for the Ninth Circuit sitting *en banc* in the case of *United States v. Apex Distributing Company,* 270 F. 2d 747, decided that the second definition (requiring a look at the legislative history of the applicable provisions) was controlling. Thus in both the *Heath* and *Apex* cases the Ninth Circuit refused to certify an appeal from an order of the District Court dismissing an indictment to the Supreme Court under §3731 of 18 U.S.C. It is submitted that this case is similar to *Heath* and *Apex* in that the dismissal of the indictment was analogous to one under Rule 48(b) of the Federal Rules of Criminal Procedure, did not come under §3731 of Title 18 U.S.C., and thus did not involve the question of a "plea in bar." In short, the District Court exercised its inherent power to do justice and dismissed the action because the defendant could not have a fair trial.

This Court in *United States v. Mersky,* 361 U.S. 431 expressly refused to decide whether the appeal involved a plea in bar. It held that the appeal had to do with the construction of a statute and stated "in view of this conclusion, we need not pass upon the claim that the District Court sustained in effect a 'Motion in Bar'" (at p. 438). In separate opinions Justices Brennan and Whittaker stated that they were of the opinion that the Court had sustained a plea in bar. Justice Stewart in a dissenting opinion in which Justices Frankfurter and Harlan joined, said that the case was not one which involved either the invalidity or the con-

struction of the statute. They were further of the opinion that the case did not involve a Motion in Bar.

It is submitted that Justice Holmes employed the proper definition in *United States v. Storrs,* 272 U.S. 652, 654 when he said:

> "The statute uses technical words, 'a special plea in bar' and we see no reason for not taking them in their technical sense. This plea is not a plea in bar and the statute does not cover the case."

In any event, the District Court did not, under either definition, sustain a plea in bar. The Court specifically relied on *Boyd v. United States,* 116 U.S. 616 and *United States v. Heath,* 260 F. 2d 623 (C. A. 9) as indicated by the following statement:

> "The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.
>
> I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, [Fol. 246] that the court should dismiss the Indictment and I will dismiss it on that ground alone." [R. p. 66.]

Dismissal of the indictment in *Heath* was in the interest of justice (similar to a dismissal under Rule 48-

(b) F.R.C.P.) on the ground the Government had lost records of the defendant necessary to his defense. It did not involve an appeal under §3731.

This Court said in *Carroll v. United States,* 354 U.S. 394, 400: ". . . appeals by the Government in criminal cases are something unusual, exceptional, not favored."

It is contended that the District Court's well considered judgment is in accord with its inherent right to do justice and is not one appealable under §3731.

It should be noted that the Appellate Court is not limited to granting relief under §3731 of Title 18, U.S.C. When the District Court abuses its discretion the writ of mandamus is available to the Government. *United States v. Igoe,* 331 F. 2d 766 (C. A. 7), is a tax case also involving §7201 of Title 26 U.S.C. Judge Igoe dismissed the indictment because the Government refused to agree to waiver of a jury trial. The Court of Appeals dismissed the appeal under §3731 but issued a writ of mandamus directing the District Court to reinstate the case, citing *United States v. Smith,* 331 U.S. 469.

It is respectfully submitted that this Court does not have jurisdiction of this case under §3731 of Title 18, U.S.C.

II.

The District Court Was Right in Dismissing the Indictment.

In *Boyd v. U.S.,* 116 U.S. 616 this Court said:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced '*the worst instrument of arbitrary*

> *power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'* since they placed *'the liberty of every man in the hands of every petty officer.'** This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" (Emphasis supplied.)

Substitute for "revenue officer" the special agent investigating the Ben Blue case and the similarity is apparent. The Special Agent, through his supervisor, on November 1, 1962, notified Ben Blue, a well known theatrical artist who has been entertaining the America public for over forty years, that prosecution for tax evasion was being contemplated. [R. pp. 6, 115.] While the recommendation of prosecution was still under consideration, on April 9, 1963, without notice to Ben Blue the Government made a jeopardy assessment against him, seized over $150,000 of his assets and filed liens of record. The Revenue Officer who filed the levies and liens pursuant to the jeopardy assessment, knew that a criminal investigation was then pending, having received this information from Special Agent Freeman. [R. p. 53.]

The levies and liens filed constituted a seizure of all of Ben Blue's known assets. [R. p. 45.] The levies attached not only to properties owned at the time the

lien arose but also to after-acquired property. *Citizens National Trust and Savings Bank v. United States,* 135 F. 2d 527 (C.A. 9). Thus, the payment of any monies by Ben Blue after the lien date, would carry the taint of the statutory lien. He was thus hamstrung financially and, after issuance of the statutory deficiency notices, was required to file petitions to the Tax Court containing verification of facts concerning the same income involved in the proposed prosecution.

More than a year after the compelled petitions were filed, Ben Blue was indicted, The file upon which the Assistant United States Attorney acted contained copies of the Tax Court petitions. [R. p. 51.] It is fatuous to assume that the petitions were innocent addenda to the file. A reading of the transcript of testimony of the Regional Counsel's representative [R. pp. 31-43; 45-52], and the argument of Government Counsel [R. pp. 49-51] will reveal the concern of the Government with regard to the petitions. Until the District Judge ordered production of the petitions great mystery surrounded their then existence and their prior association with the prosecutive file. The District Judge remarked at one point: "The Court: What do you want to get from this witness now? I haven't learned much from him so far. I am frank to confess." [R. p. 42.] The parrying of questions and the Government counsel's objections occurred at the very moment copies of the petitions in question were in Assistant United States Attorney Schulman's file. [R. p. 51.]

The "instrument of arbitrary power" *Boyd v. United States,* 116 U.S. 616 (*i.e.* the practical right to require Ben Blue to file verified petitions to the Tax Court prior to indictment) was in the possession of Special Agent Freeman and he put it into effect.

The Government in its brief seems to take the position that Ben Blue's only remedy is a Motion to Suppress evidence. But the "shalt not" command of the Fifth Amendment is not couched in evidentiary terms. We are admonished that no person "shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law."

The District Court dismissed the indictment on the ground that Ben Blue could not have a fair trial because he had been compelled to be a witness against himself. The Court relied on *Boyd v. U.S.*, 116 U.S. 616 which this court in *Malloy v. Hogan*, 378 U.S. 1 referred to as that "great case." The same concept which was applied in the *Boyd* case should control here. As was said in *Boyd:*

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of (the Fourth and Fifth Amendments). 116 U.S. 616, 630."
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> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

As the Chief of the Intelligence Division in the Los Angeles Division stated, civil liabilities were not generally assessed while a criminal investigation was in progress. [R. p. 59.] Nevertheless, Ben Blue was subjected to a jeopardy assessment and all of his assets were seized. This, without notice or any explanation whatsoever.

As was stated in *McCulloch v. State of Md.*, 4 Wheat. 316;

> ". . . The power to tax involves the power to destroy; . . . to carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all Government." This Court has also said
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> "Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law,' and below which we reach what is really trial by force." *McNabb v. United States,* 318 U.S. 332, 340.

Section 6861(a) relating to jeopardy assessment and §7201 and §7206(1) (Title 26 U.S.C.) relating to criminal sanctions are not integrated parts of the Internal Revenue Code. The jeopardy assessment provision is civil in nature and is designed to provide for direct protection of the revenue. §7201 and §7206(1) are penal in nature. Obviously what has happened here is that the Special Agent implemented his criminal

case by using a Civil Code provision never intended for that purpose. If nothing else supports this conclusion the timing of the action does.

In November, 1962 the criminal investigation was in process. In April, 1963 jeopardy assessments were made and in August, 1964 the indictment was brought. It was known to the Special Agent, of course, that once the jeopardy assessments were made a Tax Court case would follow and Ben Blue would be required to file pleadings and in due course give evidence in the civil case. Meanwhile Ben Blue's assets had been seized and liens attached to all his assets including funds acquired subsequent to the filing of the liens. In the absence of any evidence in the file supporting a reason for the jeopardy assessment, it may be assumed that the Special Agent had in mind the fortification of his criminal case.

The Government in its brief belittles the effect of the compulsion stating that Ben Blue simply entered general denials to the deficiency adjustments resulting from the jeopardy assessment. There is no indication in this case that if Ben Blue owed the Government any money, any attempt would have been made to avoid the obligation. If the purpose had not been to put Ben Blue at a disadvantage by combining the jeopardy assessment with an indictment, the indictment could have been brought before the jeopardy assessment was made.

The Government itself recognizes the unfairness of making a jeopardy assessment when a criminal investigation is pending in its policy not to assess under those circumstances. Plainly, a person under indictment who has had his assets seized is under a disadvantage.

To repeat, the intervening jeopardy assessment is completely unexplainable unless it relates to the criminal case and, "though the law itself be fair on its face and impartial in appearance" *Yick Wo v. Hopkins*, 118 U.S. 356, if it is applied in such a way as to cause illegal discrimination, it "is still within the prohibition of the constitution."

With the myriad code provisions available to Government agents it is not surprising that occasionally sophisticated methods of oppression are resorted to. The statutory provisions in themselves may be innocent enough but they can be employed in a manner not contemplated by the Congress nor consistent with due process. When Special Agent Freeman set in motion the jeopardy assessment process he was employing a civil provision of the Internal Revenue Code which implemented the criminal prosecution recommendation already made against Ben Blue. Aside from the verified petition to the Tax Court, which followed in due course, Ben Blue was hamstrung financially. The District Court found at the time of the hearing a sufficient showing had not been made that the defendant was deprived of his right to employ counsel. [R. p. 67.] This is not to say, however, that Ben Blue has not been and will not be handicapped in defending himself. Aside from the self-incrimination aspect of the case he has not been accorded the usual procedure described by Special Agent Freeman's superior. [R. p. 59.] This goes deeper than a simple denial of counsel. As this Court said in *Rideau v. Louisiana*, 373 U.S. 723, 726-7:

> "Under our Constitution's guarantee of due process the person accused of committing a crime is vouchsafed basic minimum rights. Among these

> are the right to counsel, *Gideon v. Wainwright,* 372 U.S. 335, the right to plead not guilty, and the right to be tried in a court room presided over by a Judge . . . 'due process of law, preserved for all by our constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.' *Chambers v. Florida,* 309 U.S. 227, 241."

In the dissent of Justices Clark and Harlan in the *Rideau* case they stated that while they disagreed with the result, they did not "believe it within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of impartial justice."

The actions of the Special Agent in this case should be measured with a "recognition that the American system of prosecution is accusitorial and not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan,* 378 U.S. 1. Or, as this Court said in *Boyd v. United States,* 116 U.S. 616, 635:

"Though the proceeding in question is devested of many of the aggravating incidents of actual search and seizure, yet as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedures. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

Conclusion.

It is respectfully submitted that the District Court correctly interpreted the many decisions of this Court previously cited and others such as *Griffin v. Illinois,* 351 U.S. 181; *Douglas v. California,* 372 U.S. 353; *Coppedge v. United States,* 369 U.S. 438; *Draper v. Washington,* 372 U.S. 487; *Gideon v. Wainwright,* 372 U.S. 335 in reaching its decision. Accordingly, the indictment was properly dismissed and this Court should affirm.

April 12, 1966.

Respectfully submitted,

ERNEST R. MORTENSON,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES

No. 531.—October Term, 1965.

United States, Appellant, *v.* Ben Blue.	On Appeal from the United States District Court for the Southern District of California.

[May 23, 1966.]

Mr. Justice Harlan delivered the opinion of the Court.

In 1962 the appellee, Ben Blue, was informed by the Internal Revenue Service that he might be criminally prosecuted for violation of the federal income tax laws. The following year the Service made jeopardy assessments against Blue, his wife, and his wholly owned corporation for tax liability for the years 1958 to 1960 inclusive; the known assets of all three were seized and tax liens recorded. Internal Revenue Code of 1954, §§ 6321–6323, 6331, 6861. Statutory notices were then issued giving Blue 90 days within which to file petitions if he wished to contest the proposed deficiencies in the Tax Court, I. R. C. § 6213, and Blue filed petitions setting forth his position and alleging errors in the Commissioner's determination of deficiencies. More than a year later the Government initiated the present criminal case by a six-count indictment charging Blue with wilfully attempting to evade personal income taxes for the years 1958 through 1960 and with filing false returns for his corporation during the same years. I. R. C. §§ 7201, 7206 (1).

Blue filed a pretrial motion seeking dismissal of the indictment on several grounds. After a hearing the District Court granted the motion. The court stated orally that because of the jeopardy assessment and Tax Court

proceeding Blue "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself . . . ." [1] The Government filed a notice of appeal and the case was docketed in the Court of Appeals for the Ninth Circuit. Determining that the District Court had sustained a "motion in bar, when the defendant has not been put in jeopardy" so that a direct appeal lay to this Court,[2] the Court of Appeals certified the case to us, 350 F. 2d 267, and we postponed jurisdiction, 382 U. S. 971. We agree that this Court has jurisdiction over the appeal and, on the merits, reverse the decision of the District Court.

Since Blue had not yet been brought to trial and put in jeopardy when dismissal occurred, see *United States* v. *Celestine*, 215 U. S. 278, 283, our jurisdiction under the

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[1] The court stated that it based the dismissal "on that ground alone." It rejected a claim that the seizure of property and recording of tax liens had prevented Blue from preparing an adequate defense by depleting his resources. It did not expressly consider Blue's claim that there is an administrative practice of making no assessments in advance of criminal proceedings and that failure to extend the policy to him was a denial of due process.

[2] 18 U. S. C. § 3731 (1964 ed.) provides in part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

. . . . . .

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

statute is secure if the motion sustained by the District Court was a motion in bar. See, *supra*, n. 2. This in turn depends on "the effect of the ruling sought to be reviewed," *United States* v. *Hark*, 320 U. S. 531, 536, and not on how the pleading is styled or on whether it is ultimately sustained on appeal. Like the Court of Appeals, we take the dismissal in this case as a ruling that absent reversal on review future prosecution of Blue on the pending counts is forever barred. While there are slight ambiguities in language, the District Court's dismissal was grounded in what it found to be past compulsory self-incrimination and in its apparent belief that this mischief could not be undone save by turning back the clock through ending the prosecution.

Because the dismissal by its own force would "end the cause and exculpate the defendant," *United States* v. *Hark*, 320 U. S., at 536, rather than merely abate the prosecution on account of some normally curable defect, one requisite of a motion in bar is met. Whether it is a further requisite that the motion introduce "new matter" in the fashion of a plea by way of confession and avoidance need not here be decided. See *United States* v. *Mersky*, 361 U. S. 431, 441, 453 (separate opinions disagreeing on this point). For in this instance Blue unquestionably relied on new matter in alleging self-incrimination, so the motion qualifies even under the more stringent definition. Thus under either view of a motion in bar taken in *Mersky*, this case qualifies for direct review. Our conclusion on the jurisdictional issue is further supported by two analogous decisions of this Court treating claims of *statutory* immunity as pleas in bar which permitted direct appeal. *United States* v. *Hoffman*, 335 U. S. 77; *United States* v. *Monia*, 317 U. S. 424.

On the merits of the case, we do not believe that the District Court should have dismissed the indictment.

The Government has argued that the statements made by Blue in his Tax Court petitions were no more than successive denials of the alleged underpayments and do not constitute incriminating evidence. The Government has also intimated that by merely providing the occasion for the filing of Blue's petitions in fulfilling its statutory duty to make jeopardy assessments and send deficiency notices, it ought not be regarded as compelling the taxpayer to incriminate himself within the meaning of the Fifth Amendment. There is no need, however, to consider these or other contentions that may point in the same direction.

Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.[3] While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. *Weeks* v. *United States*, 232 U. S. 383; *Rogers* v. *Richmond*, 365 U. S. 534; *Mapp* v. *Ohio*, 367 U. S. 643; *Nardone* v. *United States*, 308 U. S. 338; *Mallory* v. *United States*, 354 U. S. 449. Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by

[3] It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States*, 350 U. S. 359; *Lawn* v. *United States*, 355 U. S. 339; 8 Wigmore, Evidence § 2184a, at 40 (McNaughton rev. 1961).

exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

We remand this case to the District Court to proceed on the merits, leaving Blue free to pursue his Fifth Amendment claim through motions to suppress and objections to evidence. It is not entirely clear from Blue's brief and argument whether he seeks to sustain the dismissal below on other grounds that the District Court did not accept. See, *supra*, n. 1. Putting to one side jurisdictional difficulties this course might encounter under the direct review statute,[4] we believe it is fairer to all to regard no other grounds as presented, thus reserving to Blue the opportunity to articulate them plainly and support them by the record.

Reversed and remanded.

[4] See Stern & Gressman, Supreme Court Practice § 2–11, at 31–33 (1962); Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 97–100 (1959).